Supreme Court, U.S.
FILED
951720 APR 23 1996
OFFICE OF THE CLERK

No. 95-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

*Petitioners,*

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## PETITION FOR WRIT OF CERTIORARI

ROBERT S. BRAMS
*Counsel of Record*

ALLAN A. TUTTLE
G. KENDRICK MACDOWELL
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5650

*Attorneys for Petitioners*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

## QUESTIONS PRESENTED

1. When the interests of a party in the defense of an action are squarely opposed to those of a non-party on a contested issue, does due process permit the non-party to be bound by the adjudication of that contested issue merely because the non-party was offered the opportunity to control the defense?

2. When the interests of a party in the defense of an action are squarely opposed to those of a non-party on a contested issue, does due process permit the non-party to be bound by the adjudication of that contested issue merely because the non-party could have moved to intervene in the action?

## PARTIES TO THE PROCEEDING

Green Construction Company and American Insurance Company petition the Court for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

Pursuant to Supreme Court Rule 29.6, Petitioners provide the following corporate information. Parent company and nonwholly owned subsidiaries for **Green Construction Company**: Green Holdings, Inc.; Green Builders, Inc.; Green Engineering & Mining Company; Northland Maintenance Company. Parent companies and nonwholly owned subsidiaries for **The American Insurance Company**: Allianz Aktiengesellschaft Holding; Allianz of America, Inc.; Jefferson Insurance Company of New York; Monticello Insurance Company; Allianz Life Insurance Company of North America; Preferred Life Insurance Company of New York; Allianz of America Finance Corporation; Allianz Insurance Company; Allianz Underwriters Insurance Company; Fireman's Fund Insurance Company; The American Insurance Company; Fireman's Fund Insurance Company of Georgia; Fireman's Fund Insurance Co. of Hawaii, Inc.; Fireman's Fund Insurance Co. of Louisiana; Fireman's Fund Insurance Company of Ohio; Fireman's Fund Insurance Company of Wisconsin; Interstate National Corporation; Interstate Fire & Casualty Company; Interstate Indemnity Company; Chicago Insurance Company; American Automobile Insurance Company; Associated Indemnity Corporation; Fireman's Fund Indemnity Corporation; Fireman's Fund Insurance Company of Missouri; Fireman's Fund Insurance Company of Nebraska; Fireman's Fund Insurance Company of Texas; Midway Insurance Company of Illinois; Parkway Insurance Company; San Francisco Reinsurance Company; Vintage Insurance Company; National Surety Corporation; Warner

Insurance Company; Standard General Agency Inc.; Fireman's Fund County Mutual Insurance Co.; American Standard Lloyd's Insurance Company.

## TABLE OF CONTENTS


TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE

1. *The Legal Context* 2
2. *Facts and Proceedings Below* 5

REASONS FOR GRANTING THE WRIT 13

1. *Due Process Will Not Tolerate Estoppel Without a Hearing Where the Claims of the Voucher and the Vouchee Irreconcilably Conflict.* 14
2. *Due Process Will Not Tolerate Compulsory Intervention To Protect Against Otherwise Binding Adjudication of an Issue by a Party with Conflicting Interests.* 21
3. *This Case Presents an Ideal Opportunity to Correct a Narrow Constitutional Infirmity With Broad Implications.* 25

CONCLUSION 26

APPENDICES:

Opinion of the West Virginia Supreme Court 1a

Order Denying Petition for Rehearing 30a

Final Order of the Circuit Court of Kanawha County 31a

Order Denying Petition for Rehearing 35a

Opinion of West Virginia Court of Claims 37a

Contract and Bond Indemnity Provisions 44a

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Astoria Federal Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104 (1991) | 16 |
| *Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31 (8th Cir. 1966) | 19 |
| *Blonder-Tongue v. University of Illinois Foundation*, 402 U.S. 313 (1971) | 15 |
| *Chase Nat. Bank v. Norwalk*, 291 U.S. 431 (1934) | 23 |
| *City of Columbus v. Alden E. Stilson & Assocs.*, 90 Ohio App. 3d 608, 630 N.E.2d 59 (1993) | 20 |
| *Farm Bureau Mut. Auto Ins. Co. v. Hammer*, 177 F.2d 793, (4th Cir. 1949) *cert. denied*, 339 U.S. 914 (1950) | 20 |
| *Farrell Heating, Plumbing, Air Conditioning Contractors, Inc. v. Facilities Dev. & Improvements Corp.*, 68 A.D.2d 958, 414 N.Y.S.2d 767 (1979) | 6 |
| *Hanberry v. State Bldg. Comm'n*, 390 So.2d 277 (Miss. 1980) | 6 |
| *Hansberry v. Lee*, 311 U.S. 32 (1940) | 15, 16 |
| *Housing Authority of Texarkana v. E.W. Johnson Constr. Co.*, 264 Ark. 523, 573 S.W.2d 316 (1978) | 6 |
| *Howell v. Richardson*, 45 Ohio St. 3d 365, 544 N.E.2d 878 (1989) | 20, 21 |

*J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540 (Del. Super. Ct.), *aff'd*, 377 A.2d 1 (1977) ... 6

*Martin v. Wilks*, 490 U.S. 755 (1989) ..... 23

*Miller v. United States Fidelity and Cas. Co.*, 291 Mass. 445 (1935) ..... 20

*Morris v. Gressette*, 425 F. Supp. 331 (D.S.C. 1976), *aff'd*, 423 U.S. 491 (1977) ..... 23

*Nevada v. United States*, 463 U.S. 110 (1983) ..... 17

*Paccon, Inc. v. United States*, 399 F.2d 162 (Ct. Cl. 1968) ..... 6

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) ..... 16

*SCAC Transport (USA) Inc. v. S.S. Danaos*, 845 F.2d 1157 (2d Cir. 1988) ..... 19

*Shaffer v. Heitner*, 433 U.S. 186 (1977) (citations omitted) ..... 25

*Shea's & Mary Ball v. Massman-Kiewit-Early*, 606 F.2d 1245 (D.C. Cir. 1979) ..... 6

*United States v. Engineering and Contracting Co.*, 234 U.S. 236 (1914) ..... 6

*Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991) ..... 19

*Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316 (1896) ..... 4

**Statutes and Rules**

28 U.S.C. § 1257 ..... 1

Fed. R. Civ. P. 14 ..... 4, 21,22

Fed. R. Civ. P. 24 ..... 21, 22
W. Va. R. App. P. 7 ..... 12
W. Va. R. Civ. P. 14 ..... 21
W. Va. R. Civ. P. 19 ..... 20, 21
W. Va. R. Civ. P. 24 ..... 21, 24

**Other Authorities**

Restatement (Second) of Judgments §39 ..... 3
Restatement (Second) of Judgments §57 .....4, 18, 19
C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* ..... 18, 22
J. Moore et al., *Moore's Federal Practice* (2d ed. 1996) ..... 16
John Wiley and Sons, Inc., Construction Delay Claims (2d ed. 1992) ..... 6
Newberg on Class Actions ..... 17
Uniform Commercial Code §2 - 607(5)(a) ..... 3

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Green Construction Company ("Green") and American Insurance Company ("American") petition the Court for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

## OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 466 S.E.2d 782, 1995 W. Va. LEXIS 234 (1995), and reprinted at Petitioners' Appendix 1a. The opinion of the West Virginia Circuit Court of Kanawha County is an unpublished decision and reprinted at Petitioners' Appendix 31a. The opinion of the West Virginia Court of Claims, which was accorded res judicata effect in this proceeding, is an unpublished disposition and is reprinted at Petitioners' Appendix 37a.

## JURISDICTION

The West Virginia Supreme Court of Appeals entered judgment on December 8, 1995, and denied Petitioners' petition for rehearing on January 24, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The first section of the Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### *1. The Legal Context*

***a. Overview.*** Petitioner Green was a contractor and indemnitor of Respondent West Virginia Department of Highways ("State") on a construction contract. Petitioner American was Green's surety and likewise an indemnitor of the State. Petitioners declined an invitation to defend the State in an action against the State by another contractor. Petitioners contended that the State was responsible for the alleged damages. Therefore, Petitioners could not have properly defended the State *and* asserted their own defense against the State.

In Petitioners' absence, the action proceeded to judgment against the State. Thereafter, in this action, the State obtained summary judgment against Petitioners for the full amount of the prior judgment against the State. The court determined, without a hearing, that the prior judgment against the State should be accorded full res judicata and collateral estoppel effect, and that Petitioners therefore could not contest their liability to the State for the full amount of the judgment.

The West Virginia Supreme Court of Appeals affirmed, holding that Petitioners were properly "vouched into" the prior proceeding—or could have intervened as parties—and therefore could not litigate their claim that the State was responsible for the damages.

***b. Indemnity and Vouching.*** Petitioners were denied their day in court through an abuse of the prevalent common-law device of "vouching." Vouching enables a defendant to tender its defense to another party that may be

ultimately liable for any judgment in the action. Vouching commonly arises (as here) in the context of indemnity agreements.[1] Plaintiff brings an action against an indemnitee, who in turn looks to its indemnitor for satisfaction of any liability. The indemnitee then sends the indemnitor a "vouching notice" tendering the defense of the action. The vouching notice is not, and cannot be, an invitation to join the action as a party. Instead, the vouchee is invited merely to control the voucher's defense. The invitation requires no formal service of process, and may be accomplished, as here, by letters and telephone calls.

If the indemnitor (now vouchee) accepts the defense of the action, and can meaningfully control the defense, the ensuing judgment binds the vouchee based on traditional estoppel principles.[2] If the vouchee does not accept the defense of the action, and stays away, the prudential principles of vouching operate to bind the vouchee to the adjudication of all issues necessary to the judgment—*except* (Petitioners and many courts contend) as to issues where the interests of the voucher and the vouchee conflict.

*c. **The Division Among the Lower Courts.*** According to many state courts and federal circuits, the exception just noted—for conflicts of interests between voucher and

---

[1] The Uniform Commercial Code, § 2-607(5)(a)—adopted by 49 states and the District of Columbia—also codifies common-law vouching for buyers "sued for breach of warranty or other obligation for which his seller is answerable over."

[2] Even though not a party to the action, the vouchee actually litigates the issues by controlling the defense. Such control binds the vouchee to the judgment. *See* Restatement (Second) of Judgments § 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").

vouchee—is compelled by the constitutional guarantee of due process. For other courts, like the West Virginia Supreme Court of Appeals and the highest courts of Ohio and Massachusetts, the burden rests with the vouchee to secure its own due process by participating in the action—even where meaningful participation is untenable or, practically, impossible.

The position of the Restatement (Second) of Judgments § 57, embraced by numerous state and federal courts, absolutely vindicates the position of Petitioners in this proceeding. But the contrary position of the West Virginia Supreme Court—supported by other high court decisions and fueled by the ever-present allure of estoppel—signals the perpetuation of confusion and costly unpredictability and further erosion of due process rights.

This Court has not addressed vouching in 100 years.[3] Much has changed in the interim century—including the development of modern third-party practice such as impleader, joinder, and intervention rules. Some courts do not believe that vouching should be available where a party may be impleaded into an action under Rule 14. Other courts are loathe to limit in any respect such a venerable common-law tradition. More importantly, modern procedures may have diminished judicial sensitivity to the risk of fundamental unfairness posed by conflicts of interests, as courts more readily reason that the panoply of modern procedural options surely satisfy due process. The West Virginia Supreme Court's modern "solution" to the problem

[3] This Court last addressed vouching in *Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316, 329-30 (1896). Neither the constitutionality, nor even the propriety, of vouching was at issue. The Court was merely asked to determine the scope of the issues actually determined in the prior proceeding—the binding effect of which the parties conceded.

of conflicts—"compulsory intervention"—may look increasingly attractive to courts, but only *aggravates* the due process problem.

Petitioners ask this Court to clarify for state and federal courts, wrestling with confused jurisprudence and the temptations of estoppel and repose, that due process requires an issue to be fairly adjudicated to bind an absent party. When the interests of two parties are diametrically opposed on a contested issue, the first party cannot obtain conclusive adjudication of the issue merely by an ultimately empty invitation to control the defense.

***2. Facts and Proceedings Below.***

***a. The Contract.*** In May 1984, the State entered into separate—but partially overlapping—highway construction contracts with Petitioner Green and Elmo Greer & Sons, Inc. ("Elmo Greer"). Green obtained a surety bond from Petitioner American, as required by, and for the benefit of, the State.

The State's coordination activities and obligations became critical to planning and performance on the highway construction projects. During performance, Elmo Greer alleged that Green's actions were delaying performance of the projects. Green likewise complained to the State that it was incurring damages as a result of the operations of other contractors on adjacent projects and sought the State's coordination assistance. The State took no action to address this coordination problem.[4]

---

[4] The State was obligated—as a matter of express contract and common practice in the construction industry—to coordinate the work of the contractors, and the success of the projects depended upon all of the parties cooperating in planning and performing the work. The General Notes to the plans for Green's contract state "[i]t is imperative that there be a strict plan of coordination between

Construction industry experts were prepared to testify that the State failed to fulfill its coordination obligations and

---

contractors. ... This plan of coordination will be presented to the engineer in writing for his review and approval." (Summary Judgment Opposition, Exhibit 2). General Provision 105.7 of the State Standard Specifications also provides:

> In the event the [State's] Engineer finds that further coordination effort is necessary, he shall call a meeting of the contractors involved. After the meeting has been held, he may notify the contractors of the action required of each and his decision shall be final.

General Provision 105.1 provides:

> The Engineer will decide all questions which may arise as to the quantity, quality, and acceptability of materials furnished and work performed. The decision of the Engineer will be final.

Thus, while contractors must coordinate and cooperate with one another in the performance of their work, it is the State through its Engineer that has the ultimate control and authority to address project coordination and planning.

The State as a project owner also has an implied duty not to interfere with contractor performance. Any unreasonable action or inaction that delays the contractor's performance and increases its cost of performance can give rise to the contractor's claim for damages. *See* John Wiley and Sons, Inc. *Construction Delay Claims*, at 468-71 (2d ed. 1992) (*citing United States v. Engineering and Contracting Co.*, 234 U.S. 236 (1914); *Hanberry v. State Bldg. Comm'n*, 390 So.2d 277 (Miss. 1980); *Farrell Heating, Plumbing, Air Conditioning Contractors, Inc. v. Facilities Dev. & Improvements Corp.*, 68 A.D.2d 958, 414 N.Y.S.2d 767 (1979); *Housing Authority of Texarkana v. E.W. Johnson Constr. Co.*, 264 Ark. 523, 573 S.W.2d 316 (1978)). Where, as here, an owner contracts with multiple prime contractors on a project, this "contractual scheme imposes upon the owner the special duty of affirmatively coordinating the activities of the various prime contractors." Wiley, *supra* (*citing Shea's & Mary Ball v. Massman-Kiewit-Early*, 606 F.2d 1245 (D.C. Cir. 1979); *Paccon, Inc. v. United States*, 399 F.2d 162 (Ct. Cl. 1968); *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540 (Del. Super. Ct.), *aff'd*, 377 A.2d 1 (1977)). Again, failure to satisfy this special duty will subject the owner to a claim for damages. *Id.*

failed to take the actions necessary to insure timely performance of the work at issue. But Green never had an opportunity to present any testimony or evidence concerning performance of the projects, the actions and inaction of the parties, or the State's failure to properly coordinate the work on the projects.

On October 27, 1987, after completion of its project, Elmo Greer filed a claim against the State in the West Virginia Court of Claims seeking damages from the State in the amount of $3,211,602.59. In its Court of Claims complaint against the State, Elmo Greer alleged fault on the part of both the State and Green. Elmo Greer claimed that Green's failure to timely perform its work delayed Elmo Greer's performance. Elmo Greer also asserted that its damages were due to the State's "inaction" and the State's "acts, omissions and errors." Summary Judgment Opposition, Exhibit 9.

***b. The Vouching.*** After Elmo Greer filed its Court of Claims action, the State by telephone and letter issued various invitations to Green and American to "cooperate in the defense of the case" and "discuss" Green's handling of the defense of the Court of Claims' action.[5] Neither the State nor Elmo Greer ever invited Green to be a party in the action. Nor did the State or Elmo Greer ever file any form of pleading to join or implead Green as a party in the action.

By inviting Green to "cooperate," the State purported to "vouch" Green and American into the Court of Claims

---

[5] By letter dated October 30, 1987, the State advised Green and American of Elmo Greer's complaint in the Court of Claims. The State's letter provides in part: "Please advise us at your earliest convenience if you desire to cooperate, but in no event later than November 20, 1987, as an answer to the complaint must be filed within 30 days."

proceeding, *i.e.*, to place Green and American in the shoes of the State, not as a party, but as a participant in control of the State's defense. In this posture, Green could not have presented its own defense—that the State, rather than Green, was responsible for the delays.

Green and American initially discussed assisting in the defense of the case. However, the Court of Claims litigation was abated while Elmo Greer pursued ultimately unsuccessful claims against Green directly.[6]

When the Court of Claims litigation resumed, the matter of Green's involvement was again taken up. By letter dated April 24, 1991, the State advised Green that it intended to hold Green and American "fully liable to the [State] under the contract indemnity clause and the surety bond for any damages Greer might be awarded against the [State] as a result of the delays caused by Green." The State also advised Green of its willingness "to discuss [Green] handling its defense against Greer."

*c. **The Conflict.*** By letter dated July 22, 1991, Green's counsel advised the State's counsel that it had no obligation to defend the State, but indicated its willingness to "further discuss the nature and extent of Green's involvement." Green also advised the State that it believed the State had significant defenses to Elmo Greer's claim.

---

[6] On or about July 5, 1988, Elmo Greer initiated suit against Green in the United States District Court for the Southern District of West Virginia, at Beckley. In the District Court action, Elmo Greer sought to recover from Green those damages it allegedly sustained on the project and which it sought to recover in the Court of Claims. Elmo Greer was unsuccessful in the District Court, where its action was dismissed on summary judgment. On September 10, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal of Elmo Greer's complaint against Green.

Green declined the invitation to defend the State in the Court of Claims. However, Green did respond to the State's declared intention to file a separate declaratory judgment action seeking a determination that Green would be liable for any judgment against the State in the Court of Claims proceeding. Green advised the State that such an action would be premature, because Green and the State would have to litigate between them the critical issue of apportionment of fault for any damages awarded to Elmo Greer. Summary Judgment Opposition, Exhibit F.

The interests of Green and the State did not merely diverge on this critical issue: they were diametrically opposed. Green was prepared to prove that the State was at fault for Elmo Greer's alleged damages; the State blamed Green. Green's interests were not—and could not have been—represented in the Court of Claims litigation. And notwithstanding the State's vouching notice, Green could not have assumed *the State's* defense in the Court of Claims without irrationally betraying its own interests.

***d. The Trial Court Proceeding Below.*** On March 16, 1992, while the Court of Claims action was still pending, the State filed a complaint for declaratory relief against Green and American in the Circuit Court for Kanawha County, West Virginia. The State sought a declaration that Green and American were obligated to indemnify the State for any damages adjudged against the State in the Court of Claims action.[7]

In its answer, Green alleged that it had no duty to defend and indemnify the State against the alleged losses at issue; that it could have no liability to the State because the State

---

[7] The three indemnity-related provisions of the contract and the surety bond are set forth fully at the end of Appendix A (App. 44a-47a).

could assert against Elmo Greer a hold-harmless clause; that Green was not liable for damages that it did not cause; and that Green was not liable because of the State's failure to exercise its coordination function under its contracts with Green and Elmo Greer. Answer and Affirmative Defenses.

On May 29, 1992, the State moved for summary judgment "on the issue of whether or not the defendants, Green Construction Co. and the American Insurance Co. must indemnify the plaintiff for damages adjudged against the plaintiff in favor of Elmo Greer and Sons, Incorporated." Green opposed the State's mtion for summary judgment on several grounds.[8] Green's opposition included the critical defense—shortly to be unconstitutionally foreclosed—that Elmo Greer's damages, if any, were caused not by Green, but by the State's failure to satisfy its coordination obligations on the projects.

***e. The Estoppel.*** While the State's motion for summary judgment was pending, the Court of Claims conducted a one-day hearing on September 24, 1992 and recommended that the State pay Elmo Greer $1,214,088.68. *See* 37a-44a. Green presented no evidence and provided no testimony in that proceeding. Neither the State nor Elmo Greer attempted to bring Green into the action as a witness or a party. Nor, of course, did the State present in the Court of Claims any aspect of Green's primary contention—that *the State* was at fault for any alleged damages to Elmo Greer.

Not surprisingly, the Court of Claims concluded that Green was at fault, but never mentioned—because it was certainly never advanced by the State—the possibility that

---

[8] Green and American argued, *inter alia*, that the contract and bond indemnity provisions provided coverage for personal or bodily injury and property damage—not the contract damages or economic losses sought by Elmo Greer.

the State might have been at fault. Indeed, the *only* defense addressed (and summarily dispatched) by the Court of Claims was the State's contention that Elmo Greer should have prevailed against Green directly—a defense that obviously would have been untenable for Green as vouchee to press on the State's behalf.

After the Court of Claims issued its opinion, the Circuit Court in this proceeding granted the State's pending motion for summary judgment on its declaratory judgment claim. Without a hearing or any opportunity to amplify the proper legal effect of the Court of Claims decision, the Circuit Court essentially embraced the Court of Claims decision as a binding judgment in all respects on Green. The Circuit Court's decision recited four "conclusions of law" as a basis for Green's liability:

> (1) The defendant, Green Construction Company, by its contractual agreement, owes the Division of Highways the duty to hold it harmless from any liability that may result by reason of Green's acts or negligence.
>
> (2) The Division of Highways has suffered judgment in the Court of Claims in the amount of one million two hundred fourteen thousand eighty-eight dollars and sixty-eight cents ($1,214,088.68) as the result of the acts or negligence of the defendant, Green Construction Company.
>
> (3) The decision of the West Virginia Court of Claims may properly be given res judicata or collateral estoppel effect when that body acts as a judicial body as it did in the underlying case of Elmo Greer and Sons, Inc. vs. Division of Highways (Claim No. 87-444).

(4) There are no genuine issues of fact to be determined.
(App. 31a-34a.)

Of course, the "conclusion of law" that the State had suffered judgment in the Court of Claims because of Green's acts or negligence was premised entirely on the "collateral estoppel" effect of the Court of Claims decision. The Circuit Court undertook no independent consideration or adjudication of that critically disputed issue (nor apparently of any other issue).

***f. The West Virginia Supreme Court of Appeals.*** On March 1, 1995, the West Virginia high court granted Green/American's petition for appeal,[9] and affirmed the circuit-court decision on December 8, 1995. The West Virginia Supreme Court held that Green and American were bound by the judgment rendered in the Court of Claims solely because they were given reasonable notice of the claim, were covered under the contract indemnity language, and were offered the opportunity to defend the claim asserted by Elmo Greer. App. 27a. Thus did the West Virginia Supreme Court recite the broad strokes of certain traditional vouching principles—but inflate their operation beyond the bounds of due process.

The West Virginia Supreme Court did not discuss or account for the fact that the State *could not* have represented Green's interests as to apportionment of fault, and that Green *could not* have represented the State's interests on that issue, even if Green had assumed the State's defense. Instead, by expansive operation of collateral estoppel and res judicata, the clear conflict of interests between Green and the State

---

[9] Review by the West Virginia Supreme Court is discretionary. W. Va. R. App. P. 7.

was simply dissolved into the Court of Claims judgment against the State. If Green had wished to avoid an unfair estoppel in its absence, its "remedy" was to intervene in the primary action. App. 24a-29a.

The correction compelled in this case is simple. It requires no fact-sensitive disentangling of complex issues. It requires no inquiry into laws or procedures peculiar to West Virginia or any other state. It requires only the authoritative direction of this Court at the intersection of two principles common to American jurisprudence generally: vouching and estoppel. The principles are universal and the offense to due process plain.[10]

## REASONS FOR GRANTING THE WRIT

The West Virginia Supreme Court blessed the preclusive effect of the prior judgment for two reasons: **(1)** Green and American were properly vouched into the proceeding because they "were given reasonable notice of the claim by [the State], they were covered under the indemnity language

---

[10] Pursuant to Supreme Court Rule 14.1(g)(i), Petitioners note that the due process violation at issue in this case did not become manifest until the Circuit Court of Kanawha County *sua sponte* applied estoppel by judgment to the Court of Claims decision and granted the State's pending motion for summary judgment without a hearing and without providing any opportunity to brief or argue the proper application of the Claims Court decision. At that point, Petitioners filed a motion for relief from judgment arguing, *inter alia*, that their due process rights had been violated (pp.13-15), which was denied without opinion. App. 35a. Petitioners then raised the due process violation again on appeal to the West Virginia Supreme Court of Appeals (assignments of error, Brief at p.11; Reply Brief at pp.14-19; petition for rehearing at pp.8-13). The West Virginia Supreme Court of Appeals held that no violation of due process had occurred because the Petitioners had been properly vouched into the Court of Claims proceeding and because Petitioners could have intervened in the Court of Claims proceeding. App. 24a-29a. The petition for rehearing was denied without opinion. App. 30a.

in the contract, and they were offered the right to defend the claim" (App. 27a); and **(2)** Green and American could have protected their peculiar interests by intervening pursuant to Rule 24(a)(2) (App. 24a-29a). Both reasons are tempting expedients—hence the continuing danger to due process, with which neither reason can be reconciled. Indeed, the combination of overbroad preclusion and "compulsory intervention" *aggravates* the offense to due process.

***1. Due Process Will Not Tolerate Estoppel Without a Hearing Where the Claims of the Voucher and the Vouchee Irreconcilably Conflict.***

Green had an absolute right to argue that it was not liable as the State's indemnitor because the damage had been caused by the State. On this critical issue, the interests of Green and the State were not merely different, but diametrically opposed. The fundamental due process offense in this case derives not from vouching *per se*, but from the intolerable penalty of wholesale preclusion—even as to critical issues that could not have been fairly adjudicated by the voucher because of conflict with the vouchee.

The constitutional redress appropriate to this case is therefore both narrow and necessary. Under traditional vouching principles, which Petitioners do not challenge, most of the issues litigated in the first proceeding cannot be relitigated. It is not constitutionally significant that Petitioners may doubt the commitment or competence of the State's defense in particular respects. The interests of Green and the State were aligned as to the issues, and it matters not that Green might have handled the issues differently. Petitioners do not seek wholesale re-litigation, merely their day in court on the single critical issue that was not, and

could not have been, fairly adjudicated in the first proceeding.[11]

***a. Estoppel by Judgment and Due Process.*** It is well-settled that the prudential doctrine of estoppel by judgment is constrained by due process, which generally prohibits binding an absent party to a judgment.[12] The repose of estoppel

> is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

---

[11] In fact, Green did contend that certain defenses available to the State were not adequately litigated. But Green contends in this forum only that it ought not be bound by an issue over which Green and the State were directly in conflict.

[12] *Blonder-Tongue v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more adjudications of the identical issue which stand squarely against their position.") (citations omitted); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . , and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.") (citations omitted).

*Astoria Federal Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 107-08 (1991) (*citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).

Vouching, therefore, already tests the due process borders of estoppel by permitting an *absent* vouchee to be bound by a judgment. Even an absent vouchee over whom the court could not have obtained personal jurisdiction may be bound.[13] Therefore, the *scope* of estoppel should be an object of careful constitutional solicitude. This conclusion is inescapable: issues that could not be *fairly* adjudicated in a prior proceeding simply cannot be deemed *conclusively* adjudicated.

***b. Conflicts of Interests and Estoppel by Judgment.*** The West Virginia Supreme Court made a small, but wholly inadequate, concession to the due process limitation on estoppel of a vouchee. The rule of estoppel "is tempered by the ability of the indemnitor to show the judgment against the indemnitee was collusively obtained." App. 21a. Of course, fraud and collusion are limitations of universal agreement. But fundamental fairness is not ensured merely by the absence of fraud, anymore than the absence of murder relieves any suspicion of assault.

Certainly an indemnitee may have a conflict of interests with an indemnitor, without ever engaging in fraud or collusion in connection with the underlying judgment. But it does not properly follow that the indemnitor is bound by the judgment against the indemnitee, even as to the issues that could not have been fairly adjudicated because of the conflict

---

[13] *See* 3 J. Moore *et al.*, *Moore's Federal Practice* ¶ 14.02[2], n.5 (2d ed. 1996) (in contrast to impleader, vouching-in procedure does not require that third party be served with process). Thus, the additional due process jurisprudence of personal jurisdiction is entirely circumvented.

of interests. On this critical issue of conflicts between voucher and vouchee, the lower state and federal courts split decisively: on one side, courts (including the high courts of Ohio, Massachusetts, and West Virginia) disregard the relevance of a conflict of interests and bind the absent vouchee; on the other side, courts (including the Second, Fourth, Fifth, and Eighth Circuits, joined by high state courts and supported by the Restatement of Judgments) refuse to estop an absent vouchee whose interests directly conflicted with the voucher.

Nothing in this Court's jurisprudence supports the minority position embraced by the West Virginia Supreme Court. Indeed, while this Court has never addressed the due process constraints on vouching (or any other limitations on vouching), the Court *has* addressed the due process constraints on conflicted representation in the analogous context of class actions:

> This Court held in *Hansberry v. Lee*, 311 U.S. 32, 44, 61 S.Ct. 115, 119, 85 L.Ed. 2 (1940), that persons vicariously represented in a class action could not be bound by a judgment in the case where the representative parties had interests that impermissibly conflicted with those of persons represented.

*Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983); *see generally* 3 *Newberg on Class Actions* § 16.25 (3d ed. 1992).

The "representational theory" of section 57(2) of the Restatement (Second) of Judgments conforms vouching jurisprudence to this Court's "adequate representation" analysis in class actions. Had it been followed, the Restatement position would have dictated the opposite result in this case:

(2) If there is a conflict of interest between the indemnitee and the indemnitor regarding the injured person's claim against the indemnitee, so that the indemnitor could not properly have assumed the defense of the indemnitee, a judgment for the injured person precludes the indemnitor only with respect to issues determined in that action as to which:

(a) there was no conflict of interest between the indemnitee and the indemnitor; and

(b) the indemnitee conducted a defense with due diligence and reasonable prudence.[14]

The conflict of interest in this case is incontrovertible.[15] The State blamed Green for the alleged damages to Elmo Greer, which would support indemnification. But Green blamed the State for failing to coordinate the projects as it was obliged to do,[16] which would *not* support indemnification (or would at a minimum require some apportionment of fault to determine the extent, if any, of the indemnity obligation). Green plainly could not consistently defend both the State's interests and its own, and Green's principal defense was obviously not asserted by the State against itself. Thus, as a matter of due process, Green should

---

[14] Restatement (Second) of Judgments § 57(2) (1982).

[15] A "conflict of interest . . . exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the scope of the indemnitor's obligation and another of which is not." Restatement (Second) of Judgments § 57(3) & comment c (1982); *accord* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4452 at p.444 (1981) ("A conflict of interest exists whenever alternative theories are available, one of which would not support a claim for indemnification.").

[16] *See* note 4, *supra*.

not—and in several other jurisdictions, *would* not—have been estopped to raise its defense against the State.

Presented with fault and indemnity issues similar to this case, the Fifth Circuit reached exactly the opposite result in *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1140-41 (5th Cir. 1991). In *J-Chem*, the Fifth Circuit reversed the district court for failing to analyze the conflict of interests between the indemnitee and the indemnitor. Specifically, as here, the indemnitor contended that the indemnitee was at fault, and that issue could not have been fairly adjudicated in the first proceeding. The Fifth Circuit concluded that

> a conflict of interest between the indemnitee and the indemnitor would preclude the indemnitor from accepting the defense of the indemnitee in the primary action, and would compromise the indemnitee's defense of the indemnitor's interests. . . . For an issue to be vigorously litigated, opposing interests must diligently contest the issue. A defendant having a conflict of interest with a putative indemnitor on a particular issue cannot contest that issue diligently in the *Parklane* sense.

*Id.* at 1140. The Fifth Circuit's well-reasoned constitutional analysis applies precisely to the circumstances of this case, and the result in the two cases should have been the same. *See also SCAC Transport (USA) Inc. v. S.S. Danaos*, 845 F.2d 1157, 1162 (2d Cir. 1988) ("Where vouching is used but the indemnitor declines to assume the defense of an action, the indemnitor is bound by the result only when its interests have been adequately represented in the original action by the indemnitee.") (*citing* Restatement (Second) of Judgments § 57 (1982)); *Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31, 35 (8th Cir. 1966) (Blackmun, J.) (no estoppel

against absent indemnitor where it "could not consistently defend both [indemnitee's] interests and its own"); *Farm Bureau Mut. Auto Ins. Co. v. Hammer*, 177 F.2d 793, 801 (4th Cir. 1949) (no estoppel against insurer where "[i]t was not possible for the company in these suits to defend the insured, and at the same time to protect its own interests"), *cert. denied*, 339 U.S. 914 (1950); Restatement (Second) of Judgment § 57, Reporter's Note and cases cited therein.

The West Virginia Supreme Court elected to sweep the obvious conflict between Green and the State into the estoppel of the prior judgment, and render Green and American judgment debtors without due process of law. Against the weight of contrary federal and state authority, the West Virginia Supreme Court draws support for disregarding conflicts between indemnitee and indemnitor from the high courts of Ohio and Massachusetts. *See Howell v. Richardson*, 45 Ohio St. 3d 365, 367, 544 N.E.2d 878, 881 (1989) (estoppel applies "to those who could have entered the proceeding but did not avail themselves of the opportunity"); *see also City of Columbus v. Alden E. Stilson & Assocs.*, 90 Ohio App. 3d 608, 630 N.E.2d 59 (1993) (under *Howell*, indemnitor bound by prior judgment because even if there were a conflict, indemnitor "must enter the case nonetheless, if necessary as a third party defendant") (quoted by West Virginia Supreme Court, at App. 20a); *Miller v. United States Fidelity and Cas. Co.*, 291 Mass. 445 (1935).

While the weight of authority in federal and state courts favors Petitioners' position, it cannot be doubted that the attractions of judicial economy will perpetuate the conflict among the lower courts, unless this Court resolves the boundaries of due process. Ironically, the evolution of modern third-party procedures will likely deepen—rather than ameliorate—the split among the lower federal and state

courts. It has become dangerously easy for courts (like the West Virginia Supreme Court) to conclude that parties are capable of protecting themselves, and that whatever draconian consequences might attach to vouching are "avoidable," and thus no affront to due process.

***2. Due Process Will Not Tolerate Compulsory Intervention To Protect Against Otherwise Binding Adjudication of an Issue by a Party with Conflicting Interests.***

The West Virginia Supreme Court's only solution to the conflict of interests is constitutionally insupportable: the *absent* party must intervene under Rule 24(a) to protect its particular interests. *See* App. 24a - 29a. If the party declines to intervene, then the broadest estoppel properly attaches to the judgment.[17] This dangerously appealing misuse of modern procedure exposes the constitutional infirmity of overbroad estoppel, conflicts with recent Supreme Court precedent, and contradicts the basic precepts of vouching itself.

***a. Misuse of Modern Procedures.*** It is true that modern procedures offer ways to avoid the constitutional problems of overbroad estoppel. Specifically, Rule 14 impleader and Rule 19 joinder enable parties to a proceeding to bring third parties into a proceeding, and thus bind them to the judgment with settled principles of estoppel.[18] Importantly, however, the onus of Rules 14 and 19 rests upon the existing parties to the proceeding, precisely where the onus belongs if estoppel

---

[17] *See also Howell*, 45 Ohio St. 3d at 367, 544 N.E.2d at 881 (estoppel applies to "those who could have entered the proceeding but did not avail themselves of the opportunity").

[18] The relevant West Virginia Rules of Civil of Procedure are, in all material respects, identical to their federal counterparts. *Compare* Fed. R. Civ. P. 14, 19, 24 *with* W.Va. R. Civ. P. 14, 19, 24.

is desired. The burden of joinder—if desired—*should* be borne by the party seeking to adjudicate the interests of an absent party.[19]

However, the West Virginia Supreme Court interposed modern procedure for the benefit of the *voucher*—who already enjoys the convenience and advantage of the vouching procedure—but *not* for the benefit of the vouchee, who already confronts the practical and constitutional dilemmas of vouching, and must now add the vexation of *mandatory* intervention. Instead of justly employing modern procedure (Rules 14 and 19) to minimize or eliminate the potential due process offense of vouching, the West Virginia Supreme Court employed a modern *voluntary* procedure (Rule 24) to *compound* the due process offense. The court's theory effectively *compels* the vouchee to intervene, and extends the specter of estoppel even to issues that could not have been fairly adjudicated—solely for failure to seize an opportunity for "voluntary" intervention.

***b. Conflict With Supreme Court Precedent.*** This Court has proscribed "compulsory intervention" (where the alternative is preclusion) as an offense to due process. As Justice Brandeis described the essential principle:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary

[19] Some courts conclude that vouching ought not even be available where the vouchee can be impleaded. *See, e.g., SCAC Transport (USA) Inc. v. S.S. Danaos*, 845 F.2d 1157, 1162 (2d Cir. 1988) ("Common-law vouching is a superfluous procedure where impleader is available.") (*citing* 18 C. Wright, A Miller & E. Cooper, *Federal Practice and Procedure* § 4452 at 445-46 (1981) ("Vouching need be preserved only for cases in which lack of personal jurisdiction or other limitations make impleader unavailable.")). However, the *utility* of vouching is not a constitutional question. In a variety of circumstances, many of them arguably unnecessary or ill-conceived, vouching will persist.

> intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

*Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934); *see also Morris v. Gressette*, 425 F. Supp. 331, 335 (D.S.C. 1976) (three-judge court) (rejecting contention that availability of intervention triggered estoppel, and stating that "[s]uch an argument, so contrary to fundamental concepts of due process, can be justified neither in reason nor on authority . . . ."), *aff'd*, 423 U.S. 491 (1977).

More recently, Chief Justice Rehnquist reaffirmed the principle in *Norwalk*, and specifically confirmed its force in the context of modern procedure:

> [A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. . . . Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction and bound by a judgment or decree.

*Martin v. Wilks*, 490 U.S. 755, 763, 765 (1989) (citations omitted). As the Chief Justice observed in *Martin*, the concept of compulsory intervention then enjoyed "sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals." 490 U.S. at 762 & n.3 (citing cases). Evidently, the Court's pronouncement in *Martin* did not fully put the mischief to rest. Again, the allure of judicial economy is powerful, and the continuing threat to due process correspondingly substantial.

***c. The Contradictory Operation of Vouching and Compulsory Intervention.*** In the vouching context,

"compulsory intervention" is particularly insupportable. If the voucher and the vouchee are locked in a conflict of interests, as here, then "compulsory intervention" disserves both parties and distorts justice. If the vouchee intervenes as a third-party, and properly undertakes to protect its own interests at the voucher's expense, then the vouchee-intervenor can hardly be expected simultaneously to control the defense of the voucher—with whom it is in direct conflict. Compulsory intervention—when the voucher and vouchee are in conflict—is therefore irreconcilable with vouching itself.[20]

Alternatively, if the vouchee declines to intervene, as here, then the vouchee risks conclusive adjudication of its defenses by the very party against whom the vouchee's defenses are directed, based solely upon the fiction that vouching and compulsory intervention work together and serve the same purpose.

The West Virginia Supreme Court's Rule 24(a) solution is no solution. It is a tempting expedient that obscures the deeper due process infirmity of overbroad estoppel by shifting yet another burden of self-protection to the absent party.

---

[20] The irony of suggesting both participation as a vouchee and intervention as a third-party defendant is exposed by the express terms of Rule 24(a). Intervention of right under Rule 24(a) is *not available* if "the applicant's interest is adequately represented by existing parties." W.Va. R. Civ. P. 24(a); *see also* Fed. R. Civ. P. 24(a). *A fortiori*, Petitioners' interests could not have been adequately represented by the State's defense in the Court of Claims proceeding. Yet Petitioners were expected to control the State's defense, as vouchees, and to perpetuate the *inadequate* representation of their own interests.

### *3. This Case Presents an Ideal Opportunity to Correct a Narrow Constitutional Infirmity With Broad Implications.*

This case is simply about a fair opportunity to litigate an issue that could not have been fairly litigated in a prior proceeding. The case narrowly frames the mischief of vouching, without implicating its general usefulness. It is therefore an ideal vehicle for this Court's resolution of the conflict in the lower federal and state courts.

While the issue framed by this case is conveniently narrow, its implications—and the corresponding benefits of this Court's resolution—reverberate throughout the legal and economic life of the nation. Vouching has deep roots in English common law and has flourished in America.[21] The practice affects the rights of individuals and businesses in a host of tort, contract, and admiralty actions, as well as the industries of manufacturing, retail, construction, shipping, insurance, and suretyship. Vouching continues to serve useful purposes—*if* properly constrained by due process considerations.

Petitioners do not contest the general usefulness of common-law vouching, nor the general economies of collateral estoppel and res judicata. The first party may conclusively adjudicate all issues as to which there is no conflict with the absent party. Or the first party may implead the absent party, and thereby obtain a binding judgment on

---

[21] Of course, the ancient origins of vouching do not immunize it from constitutional scrutiny. "'Traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (citations omitted).

all issues. But Petitioners fairly challenge the loss of their day in court on an issue that was not and could not have been fairly or meaningfully litigated.

One prominent and regrettable fact of modern litigation is beyond dispute: on the crowded dockets of nearly every state and federal court in the nation, estoppel has increasing appeal. Underuse of estoppel may deny justice and certainly delays it. Overuse of estoppel deprives parties of property without due process of law. The balance that must be struck properly belongs to this Court.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Robert S. Brams
*Counsel of Record*
Allan A. Tuttle
G. Kendrick Macdowell
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington D.C. 20037
(202) 457-6000

April 23, 1996

# APPENDIX

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1995 Term

---

No. 22791

---

FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS,
Plaintiff Below, Appellee

V.

GREEN CONSTRUCTION COMPANY, AN IOWA CORPORATION, AND THE AMERICAN INSURANCE COMPANY, A NEBRASKA CORPORATION,
Defendants Below, Appellants

---

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
HONORABLE IRENE C. BERGER, JUDGE
CIVIL ACTION NO. 92-C-1136

AFFIRMED

---

Submitted: September 20, 1995
Filed: December 8, 1995

Anthony G. Halkias
Jeff Miller

Robert S. Brams
Gadsby & Hannah

Legal Division
West Virginia Department of
Transportation
Charleston, West Virginia
Attorneys for the Appellee

Washington D.C
James K. Brown
Anthony J. Majestro
Jackson & Kelly
Charleston, West Virginia
Attorneys for Appellants

RETIRED JUSTICE MILLER, sitting by temporary assignment, delivered the Opinion of the Court.

JUSTICE ALBRIGHT did not participate.

## SYLLABUS BY THE COURT

1."'A circuit court's entry of summary judgment is reviewed de novo.' Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1, Jones v. Wesbanco Bank Parkersburg, ____ W. Va. ____, 460 S.E.2d 627 (1995).

2."'"'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992).' Syl. pt.2, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 2, Jones v. Wesbanco Bank Parkersburg, ____ W. Va. ____, 460 S.E.2d 627 (1995).

3.A liquidated damage clause for delay in completing contract work does not preclude an injured party from recovery compensatory damages under the contract unless the liquidated damage clause expressly limits the right to such other damages.

4.In construing the language of an express indemnity contract, the ordinary rules of contract construction apply.

5."A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, Cotiga Development Co. V. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962).

6.Where an indemnitor is reasonable notice by the indemnitee of a claim that is covered by the indemnity

agreement and is afforded an opportunity to defend the claim and fails to do so, the indemnitor is then bound by the judgment against the 4indemnitee if it was rendered without collusion on the part of the indemnitee.

7. When the State or one of its agencies is sued in the Court of Claims and the State has an indemnity agreement with a third party indemnitor , upon reasonable notice by the State or its agency to defend under the indemnity agreement, the indemnitor must either defend the suit or intervene under Rule 24(a)(2) of the West Virginia Rules of Civil Procedure and assert any defenses it claims would enable it to avoid the duty to defend the indemnitee under the indemnity agreement. The failure to take either step forecloses the indemnitor from contesting the validity of the judgment rendered against the indemnitee on any grounds except a claim that the indemnitee allowed the judgment to be obtained by collusion in the Court of Claims.

Miller, Justice:

Green Construction Company (Green), an Iowa corporation, and The American Insurance Company (American), a Nebraska corporation, appeal from an order of the Circuit Court of Kanawha County, entered August 23, 1994, granting summary judgment to Fred VanKirk, West Virginia Commissioner of Highways (DOH). DOH filed a declaratory judgment action in the circuit court contending that Green, under its contract, and American, under its bond, were required to indemnify DOH for the amount awarded by the Court of Claims against DOH in favor of Elmo Greer and Sons, Inc. (Greer). The Court of Claims recommended and the West Virginia Legislature awarded compensation to Greer in the amount of $1,214,088.68. The circuit court found that Green and American had a duty to indemnify DOH for the amount awarded against it by the Court of Claims.

Green and American assert several errors. The first is the claim that the circuit court erred in granting res judicata or collateral estoppel to the Court of Claims' judgment. In addition, they assert such action violated their due process rights because they were not parties to the Court of Claims proceedings. Complaint also is made that the circuit court erred in finding that the indemnity contract with DOH required Green and American to indemnify DOH for the negligence. Upon review, we affirm the judgment of the circuit court.

I.

On May 14, 1984, DOH entered into a contract with Green for the construction of 27,551 linear feet of Interstate Route 64 in the area of the Bragg Interchange. On May 22, 1984, DOH entered into a contract with Greer for the construction of 12,899 linear feet of Interstate Route 64 from east of Glade Creek to the Bragg Interchange. Green's

worksite overlapped with Greer's worksite for 1,050 linear feet. Green was to install a box culvert and perform special embankment work with a completion date of October 31, 1984. Afterwards, Greer was to complete the fill work. Greer could not complete its project until Green's work was complete.

As the result of delays, DOH asked Green several times to comply with its contractual obligations. DOH granted deadline extensions to Green that were not met. Greer then agreed to help Green complete Green's job. Green's delays caused Greer to incur additional construction costs which became the subject of the underlying Court of Claims case. Moreover, Greer discovered several construction errors made by Green when Greer began its project. As a result, Greer had to correct those errors before it could proceed. This caused additional construction costs to Greer.

On January 6, 1987, Greer submitted a claim to DOH alleging damages in the amount of $3,211,602.59. These damages were described by Greer as "monetary losses stemming from, and directly attributable to the delay in the completion of the box culvert and special embankment ... by Green[.]" On January 16, 1987, DOH forwarded Greer's claim letter to Green, stating the claim was due to Green's "failure to meet the contract completion date for specific work on your project."

On October 27, 1987, Greer filed a claim against DOH in the Court of Claims. DOH's contract with Green included several save harmless clauses. Furthermore, American issued a contract bond which Green signed as principal and American as surety. It also provided they would save and keep harmless DOH from all losses caused by Green in the construction of the highway project.

On October 30, 1987, by certified mail, DOH provided Green and American with a copy of the complaint Greer filed

in the Court of Claims. DOH informed both Green and American it was holding them responsible for any damages awarded to Greer. DOH communicated its expectation to be indemnified pursuant to Green's contract and the contract bond. Green was given thirty days to advise DOH regarding Green's desire to cooperate. American responded by letter dated November 18, 1987, advising DOH it had investigated the claim with its principal (Green). American indicated it would "coordinate future involvement through them. Preliminarily, they have indicated an interest in assisting your department in the defense of this matter."

On July 5, 1988, Greer filed a complaint against Green in the United States District Court for the Southern District of West Virginia. In the federal complaint, Greer requested damages premised on three separate counts: (1) Greer claimed to be a third-party beneficiary of Green's contract; (2) Greer claimed Green breached an express agreement made with Greer; and, (3) Greer claimed Green was liable to Greer based on promissory estoppel. Green filed a motion for summary judgment on each count, which the District Court granted by order dated May 9, 1990. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision on September 10, 1991 in an unpublished opinion.

This federal court action appears to have delayed any substantial activity in the Court of Claims case filed by Greer in October, 1987. On April 15, 1991, Green's attorney sent a letter to DOH confirming a telephone conversation of that date. That letter acknowledged that Green did want to play a part in the conduct of DOH's defense in the Court of Claims. It concluded nothing would be done until the appeal in the Fourth Circuit Court of Appeals was decided. DOH's attorney wrote Green's attorney on April 24, 1991, reiterating that Green and American had contractual indemnity

obligations with DOH on the Greer case in the Court of Claims and suggesting they assume DOH's defense. On July 22, 1991, Green's attorney responded, stating: "At this time, Green neither accepts the [DOH's] invitation to defend against the claim, nor admits any obligation to the Division of Highways."

Further contact ensued oetween DOH and Green about DOH's proposed filing of a declaratory judgment action against Green to determine Green's indemnity obligation to defend DOH. On October 25, 1991, Green's attorney wrote DOH in an attempt to dissuade it from filing suit. This action was followed by correspondence regarding a possible legal defense to be made by DOH in Greer's case in the Court of Claims. In September, 1992, the Court of Claims conducted a hearing in this matter with no participation by Green or American. The Court of Claims issued its opinion on December 11, 1992, and granted an award of $1,214,088.68 against DOH.

On March 16, 1992, DOH filed a complaint for declaratory judgment relief in the circuit court seeking to have the judgment of the Court of Claims imposed on Green and American. This action was based on the written indemnity agreements. On June 2, 1992, DOH filed a motion for summary judgment. The circuit court entered its final order on August 23, 1994, and granted the motion for summary judgment against Green and American in the amount of $1,214,088,68. It is from this final order that Green and American appeal.

II.

We begin by recognizing that our standard of review for a circuit court's granting of summary judgment is set out in Syllabus Points 1 and 2 of Jones v. Wesbanco Bank Parkersburg, ___ W. Va. ___, 460 S.E.2d 627 (1995):

"1. 'A circuit court's entry of summary judgment is reviewed de novo.' Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"2. ""'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706 , 421 S.E.2d 247 (1992).' Syl. pt. 2. Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)."

III.

We initially address the indemnity language in order to determine if an indemnity obligation exists. Obviously, if none exists, there would be no need to discuss the other alleged errors. In Green's contract with DOH, there are several provisions that contain indemnification language.[1]

In General Provision 107.14 of the standard specifications, which is a part of the contract, there also is

---

[1] For example, paragraph 4 of the contract contains the following language: "CONTRACTOR agrees . . . to save the DEPARTMENT harmless from all liability for damage to persons or property that may accrue during and by reason of acts or negligence of the CONTRACTOR, his agents, employees, or subcontractors if there be such."

language which requires Green to indemnify DOH against any claims or suits arising because of injuries or damage to any persons or property on account of the operations of the contractor. There is further language for indemnity against suits "because of any act or omission, neglect, or misconduct of the Contractor."[2]

Furthermore, the contract bond signed by Green as principal and American as surety, which binds them to the State of West Virginia (DOH) in the amount of $8,844,869.70, contains indemnity language. It requires Green and American to truly comply with the terms and conditions "of the road contract" and to "save harmless [DOH] from any expense incurred through the failure of said contractor . . . to complete the work as specified, and for any damages growing out of the carelessness or negligence of said contractor . . . [and] from all losses to it . . . from any cause whatever . . . in the manner of constructing said Road[.][3] This indemnity language, particularly the last

---

[2] The relevant portion of General Provision 107.14 states:

"RESPONSIBILITY FOR DAMAGE CLAIMS:

> "The Contractor shall indemnify and save harmless the Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; . . . or because of any act or omission, neglect, or misconduct of the Contractor[.]"

[3] More fully, the applicable language of indemnity in the contract bond is:

> "shall save harmless the West Virginia Department of Highways and the State of West Virginia from any expense incurred through the failure of said contractor, including subcontractors, to complete the work as specified, and for any damages

portion providing "from all losses to it . . . from any cause whatever" in Green's construction of the road, undoubtedly is broader than the other two provisions cited above.[4]

Several points are argued by Green and American to avoid the express indemnity language. One argument is that there was a provision for liquidated damages of $300 a day for failure to complete the project by the contract due date which Green and American claim limits their liability to this amount.[5] However, there is no language in this provision which states it is to be the exclusive remedy for all damage claims arising from Green's construction contract. It is

> growing out of the carelessness or negligence of said contractor, his, their or its servants, agents and employees, or his subcontractors, their agents, servants, and employees, and shall fully pay off and discharge and secure the release of any and all mechanics' liens which may be placed upon said property by any subcontractor, laborer or material men, and shall also save and keep harmless the West Virginia Department of Highways and the State of West Virginia from all losses to it or them from any cause whatever including patent, trade-mark, and copyright infringements in the manner of constructing said Road[.]" (Emphasis added).

[4] It is generally recognized that under this type of bond both the principal (Green) and its surety (American) are bound to the State of West Virginia (DOH). As we explained in part of Syllabus Point 3 of United States Fidelity and Guaranty Co. v. Hathaway, 183 W. Va. 165, 394 S.E.2d 764 (1990): "There is a vital distinction between a contract of suretyship and a contract of indemnity. In a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal[.]"

[5] The relevant language of the liquidated damage paragraph from General Provision 108.7 of Green's contract states: "[DOH] will assess liquidated damages against the Contractor for each calendar day that any work remains uncompleted after the contract time specified for completion of the work, subject to such extensions of contract time as may be allowed by 108.6."

obvious that the liquidated damage provision was for any delay by Green in finishing the project by the contract completion date. We believe the liquidated damage clause was entirely separate from the claim made by Greer against DOH that Green's delay in completing its contract caused Greer to suffer substantial costs over and above its contract price. It generally is held that a liquidated damage clause for delay in completing contract work does not preclude the injured party from recovering compensatory damages under the contract unless the liquidated damage clause expressly limits the right to such other damages. As explained in Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985), "[a] provision for liquidated damages will not prevent recovery for actual damages for events which are not covered by the liquidated damages clause, unless the contract expressly provides that damages other than those enumerated shall not be recovered." (Citations omitted). See also Lawson v. Durant, 213 Kan. 772, 518 P.2d 549 (1974); Spinella v. B-Neva Inc., 580 P.2d 945 (Nev. 1978). See generally 25 C.J.S. Damages § 114 (1966).

Green also argues as a defense that its contract (as well as Greer's contract) included General Provision 105.7 which dealt with cooperation among contractors. Under this provision, each contractor agreed to "protect and save harmless [DOH] from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors working within the limits of the same project."[6] Green contends this clause should have exonerated

---

[6] More fully, the pertinent portion of General Provision 105.7 states:

> "When separate Contracts are let within the limits of any one project, each Contract or shall conduct his work so as not to interfere with or hinder the progress or completion of the work being performed by other contractors. Contractors

DOH in the Court of Claims and prevented Greer's recovery for excess costs attributed to Green's work. In its brief, DOH claims that it did assert the language of General Provision 105.7 in the Court of Claims as a defense, but the Court refused to consider it as a bar to Greer's claim.

Green and American do not controvert DOH's assertion, but contend that DOH had reservations about the efficacy of this defense. Therefore, Green and American argue a conflict was created between its position that General Provision 105.7 was a bar to Greer's suit in the Court of Claims and DOH's reservations as to the bar. Green and American now claim this alleged conflict of interest precluded their representation of DOH from an ethical standpoint. We reject this argument on several grounds. First, there is nothing in the correspondence by Green and American that ever advised DOH it was on this basis that they declined to indemnify it. Second, DOH did assert this provision in the Court of Claims. Green and American do not claim that DOH's defense of the suit was collusive.

Finally, Green asserts that the indemnity language is only for liability arising from damages or losses through injury to persons or property. As support, Green cites two cases where courts held the involved indemnity language was not sufficient to cover economic losses. E.g., Fairbanks North Star Borough v. Roen Design Assocs., Inc., 727 P.2d 758

---

working on the same project shall cooperate with each other as directed.

"Each Contractor involved shall assume all liability, financial or otherwise, in connection with his Contract and shall protect and save harmless [DOH] from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors working within the limits of the same project."

(Alaska 1986),[7] and Friedman, Alschuler and Sincere v. Arlington Structural Steel Co., Inc., 140 Ill. App. 3d 556, 95 Ill. Dec. 87, 489 N.E.2d 308 (1985).[8]

In Fairbanks North Star Borough, the borough entered into a design contract with Roen for the layout of a subdivision. However, when work was started by a contractor to build roads in the subdivision, design defects were encountered. The contractor sued the borough and Roen. The borough, in turn, sought to obtain indemnification from room. The Alaska court found the indemnity language focused only on "'injuries or damages to persons or property,'" which it concluded "limit[ed]

---

[7] The pertinent indemnification language in Fairbanks North Star Borough, 727 P.2d at 759, is:

> "'The Contractor shall save, hold harmless and indemnify the Borough from any liability, claims, suits or demands, including costs, expenses and reasonable attorney's fees, incurred for or on account of injuries or damages to persons or property as a result of any act or omission of the Contractor in the performances pursuant to this contract.' "

[8] The relevant indemnity language in Friedman, Alschuler and Sincere, 140 Ill. App. 3d at 558-59, 95 Ill. Dec. at 88, 489 N.E.2d at 309, is:

> "'To the extent permitted by applicable law, it is understood and agreed that Subcontractor shall defend, indemnify and save harmless Contractor, its officers, employees, agents and servants, the Owner, and the Architect against all loss, damage and expense, whether incurred or paid, on account of death, injuries, damages or loss to persons (including, without limiting the generality of the foregoing, employees of Subcontractor) or property, caused by or in any way arising directly or indirectly out of or connected with or incidental to the performance of the work by Subcontractor[.]' "

indemnifications to claims and liability based on physical injury or damage to persons or tangible property." 727 P.2d at 760. (Emphasis deleted).

The Illinois court in Friedman, Alschuler and Sincere, supra, came to much the same conclusion where an architectural firm sought to obtain indemnity from subcontractors who installed defective material in a building, causing it to partially collapse. The architectural firm settled with the building's owner and pursued indemnity under its contract as the general construction manager of the building. The court focused on the indemnity language against loss and damage " 'on account of death, injuries, damages, or loss to persons . . . or property.' " 140 Ill. App. 3d at 559, 95 Ill. Dec. at 88, 489 N.E.2d at 309. It found this language "limit[ed] indemnification to personal and property damages, the economic damages alleged by [the architectural firm] are not recoverable here[.]" 140 Ill. App. 3rd at 559, 95 Ill. Dec. at 89, 489 N.E.2d at 310.

It may well be that if the only indemnity language that DOH had to rely upon was that contained in paragraph 4,[9] it would not be able to recover under its indemnity agreement. However, the broader indemnity language contained in General Provision 107.14 and that of the contract bond is not limited to injuries to the persons or property. In construing the language of an express indemnity contract, our ordinary rules of contract construction apply. Sellers v. Owens-Illinois Glass Co., 156 W. Va. 87, 92-93, 191 S.E.2d 166, 169 (1972). See generally 41 Am. Jur. 2d Indemnity § 12 (1995).

We find the indemnity language in question to be sufficiently plain, unambiguous, and broad to cover the losses incurred by Greer as a result of the delay, neglect, and

---

[9] For the applicable language of paragraph 4, see note 1, supra.

omissions of Green. The indemnity language in General Provision 107.14 is "from all suits, actions, or claims of any character" arising "on account of the operations of the Contractor[.]"[10] Moreover, the contract bond indemnity language is even broader, covering losses to DOH from any cause whatsoever from the construction of the road.[11] There is no limitation in the indemnity language to damages arising for personal injuries and property damage. This indemnity language is sufficiently plain to meet the requirements of Syllabus Point 1 of Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962):

> "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."

See also Fraley v. Family Dollar Stores of Marlinton, W. Va., Inc., 188 W. Va. 35, 422 S.E.2d 512 (1992); Kanawha Valley Power Co. v. Justice, 181 W. Va. 509, 383 S.E.2d 313 (1989).

IV.

Green and American claim their due process rights were violated when the circuit court gave res judicata effect to the Court of Claims judgment when they were not parties to and did not appear in the Court of Claims action filed by Greer. In indemnity cases, we recognize the distinction between

---

[10] For the applicable language of General Provision 107.14, see note 2, supra.

[11] See note 3, supra, for the indemnity language of the contract bond.

indemnity and implied indemnity. See Syl, pt. 1, Valloric v. Dravo Corp., 178 W. Va. 14, 357 S.E.2d 207 (1987).[12]

In this case, we deal with an express indemnity agreement. Moreover, under our indemnity law, where indemnitors (such as Green and American) are given reasonable notice by the indemnitee of a claim that is covered by the indemnity agreement and are afforded an opportunity to defend the claim and fail to do so, the indemnitors are then bound by the judgment against the indemnitee if it was rendered without collusion on the part of the indemnitee. We spoke to this point in Hill v. Joseph T. Ryerson & Son, Inc., 165 W. Va. 22, 28, 268 S.E.2d 296, 302 (1980), where we quoted Section 32a(2) from 42 C.J.S. Indemnity (1944). Similar language now is found in Section 56a of 42 C.J.S. Indemnity (1991), which states:

> "Where the indemnitor is notified of the pendency of an action against the indemnitee in reference to the subject matter of the indemnity and is given an opportunity to defend such action, the judgment in such action, if obtained without fraud and collusion,

---

[12] Syllabus Point 1 of Valloric, supra, states:

> "There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful."

> is conclusive on the indemnitor as to all questions determined therein which are material to a recovery against him in an action for indemnity brought by the indemnitee; and it is not open to collateral attack by the indemnitor, and the judgment is conclusive against the indemnitor whether or not he appears and defends." (Footnotes omitted).

See also Valloric, supra.

Our indemnity law is consistent with that of other jurisdictions where courts hold that an indemnitor given reasonable notice by the indemnitee is obligated to assume the defense and, if the indemnitor does not, then it is bound by the judgment. See, e.g., D.G. Shelter Prods. Co. v. Moduline Indus., Inc., 684 P.2d 839 (Alaska 1984); Litton Systems, Inc. v. Shaw's Sales and Servs., Ltd., 119 Ariz. 10, 579 P.2d 48 (1978); Trustees of New York, New Haven & Hartford R.R. Co. v. Tileston & Hollingsworth Co., 189 N.E.2d 522 (Mass. 1963); Liberty Mut. Ins. Co. v. J. R. Clark Co., 239 Minn. 511, 59 N.W.2d 899 (1953); City of Columbus v. Alden E. Stilson & Assoc., 90 Ohio App. 3rd 608, 630 N.E.2d 59 (1993); Southern Ry. Co. v. Arlen Realty and Dev. Corp., 220 Va. 291, 257 S.E.2d 841 (1979). Both Litton Systems, Inc., supra, and Liberty Mutual Insurance Co., supra, specifically discuss due process. The Arizona court in Litton Systems, Inc., made this summary: "Binding the indemnitor to a judgment against the indemnitee, where the indemnitor has received due notice of the pending litigation, is not a denial of due process." 119 Ariz. at 14, 579 P.2d at 52. (Citation omitted).[13]

---

[13] The rationale behind the indemnitor's liability is summarized in

Green and American cite cases that speak to due process concerns in other than indemnity situations. While we agree with the principles they espouse, under the particular facts, we find them not to be helpful in this case.[14] Green and American cite both Valloric, supra, and Hill, supra, but fail to acknowledge the language in these cases that provides that if reasonable notice is given to the indemnitor and it refuses to honor the indemnity agreement, it is bound by the judgment. Instead, Green and American quote language from both cases referring to an indemnitor who received no notice of its duty to indemnify.

We also find Green's and American's citation to several other cases not to be helpful to their position. For instance, Chicago Title Insurance Co. v. IMG Exeter Associates Ltd.

---

Section 57 of the Restatement (Second) of the Law of Judgments at 78 (1982):

> "The existence of the right of defense is a basis for estoppel against the indemnitor if he fails to exercise it after having received notice of the action. Having had the opportunity to defend the action against the indemnitee, he may not dispute the correctness of the determinations arrived at in the action if he fails to exercise that opportunity. Had he taken over the defense of the indemnitee, he could have litigated the question of the indemnitee's liability and also the amount of recovery to which the injured person is entitled. The indemnitor's opportunity to litigate accordingly results in his being estopped to dispute the existence and extent of the indemnitee's liability to the injured person."

[14] Most of the cases cited involve lack of notice or the refusal to allow a party to be heard before being deprived of a property interest. See, e.g., United States v. James Daniel Good Real Property, ___ U.S. ___, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993) (forfeiture of real estate without hearing); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) (discharge from job without hearing); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) (lack of adequate notice).

Partnership, 985 F.2d 553 (4th Cir. 1993), is an unpublished disposition. Under the Internal Operating Procedures (I.O.P.) of the United States Court of Appeals for the Fourth Circuit, the court "will not cite an unpublished disposition in any of its published or unpublished dispositions." I.O.P. 36.6. Consequently, we decline to consider this case.

According to Green and American, Chicago Title Insurance Co., supra, cited Jennings v. United States, 374 F.2d 983 (4th Cir. 1967). However, Jennings also recognizes the rule "that where an indemnitor is notified and can take part in--indeed may control--the litigation, he is precluded from contesting the indemnitee's liability in the subsequent indemnity action." 374 F.2d at 986. This same proposition was acknowledged in another case cited by Green and American, Southern Railway Co. v. Arlen Realty and Development Corp., 220 Va. at 295, 257 S.E.2d at 844: "[A] judgment entered in favor of a third party against the indemnitee is not conclusive upon the indemnitor unless the indemnitee gave the indemnitor notice of and an opportunity to defend the prior suit." See generally Annot., 73 A.L.R.2d 504 (1960).

The factual record in this case is clear. Green and American did receive adequate notice of Greer's claim against DOH and had an opportunity to defend. By letter dated January 16, 1987, DOH forwarded to Green and American the itemized damage claim it received from Greer, which asserted these damages were a result of Green's delays. On October 30, 1987, DOH transmitted to Green and American, by certified mail, a copy of the complaint filed against it on October 27, 1987, in the Court of Claims. In its letter, DOH advised both parties that it expected to be indemnified by them. As stated more fully in Part I, supra, both Green and American acknowledged these letters and were aware of Greer's suit in the Court of Claims.

Ultimately, they did not assume defense of DOH in the Court of Claims.

V.

Both Hill, supra, and Valloric, supra, indicate the judgment rendered against an indemnitee has a res judicata or collateral estoppel effect when a suit is filed against the indemnitor to collect the judgment.[15] This precludes the indemnitor from relitigating issues, such as the indemnitee's liability to the injured party or the amount of damages awarded. Also foreclosed are other issues that were litigated in the former action defended by the indemnitee. This rule is tempered by the ability of the indemnitor to show the judgment against the indemnitee was collusively obtained, as set out in Hill, 165 W. Va. at 28-29, 268 S.E.2d at 302, quoting 42 C.J.S. Indemnity § 32a (1944). See also Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, 380 N.E.2d 571(1978); Globe & Republic Ins. Co. v. Independent Trucking Co., 387 P.2d 644 (Okla. 1963); City of Burns v. Northwestern Mut. Ins. Co., 248 Or. 364, 434 P.2d 465 (1967); Shamrock Homebuilders, Inc. v. Cherokee Ins. Co., 225 Tenn. 236, 466 S.W.2d 204 (1971), appeal after remand, 486 S.W.2d 548 (Tenn. App. 1972).

Green and American do not assert that DOH's defense in the Court of Claims was collusive as to Greer's claim. We discussed in Part III the several claims made by Green and American of a valid defense to avoid the indemnity agreements. We rejected them and need not go over them in detail. It is sufficient to state that none of their claims reached the level where it can be said the judgment was

---

[15] It generally is recognized that reasonable attorney's fees are also collectible by an indemnitee in defense of the suit. See State ex rel. Vapor Corp. v. Narick, 173 W. Va. 770, 775, 320 S.E.2d 345, 350 (1984). The right to collect interest on the judgment was approved in Valloric, 178 W. Va. at 22, 357 S.E.2d at 215-16.

collusive. For future guidance of the parties, we adopt the positions taken by the Ohio court in City of Columbus v. Alden E. Stilson & Associates, supra. There, Stilson claimed it could not honor its indemnity agreement with the City because of a conflict in another case. The court rejected this claim by holding such matters were required to be litigated in the original action:

> "Moreover, even if we were to find, as Stilson urges in the arguments set forth above, that a conflict existed, the Ohio Supreme Court has expressly held that where an indemnitor believes that its interest does not coincide with that of the indemnitee, it must enter the case nonetheless, if necessary as a third party defendant:
>
> > "'It is this opportunity that must be seized. Otherwise, whether seized or not, the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding.' Howell v. Richardson, (1989), 45 Ohio St.3d 365, 367-368, 544 N.E.2d 878, 881.
>
> Under Howell, the time has passed at which Stilson could properly have asserted its right to a judicial determination of its obligation to defend under the indemnity clause. The rule set forth in Howell appears to promote judicial economy by preventing relitigation of previously

> decided issues, while preserving the indemnitor's right to establish either a conflict of interest or non-applicability of an indemnity provision." 90 Ohio App. 3d at 616, 630 N.E.2d at 64-65.

We address Green's and American's argument that they could not appear in the Court of Claims as there is no procedure for a third party to come into an action in the Court of Claims. Such a third-party practice, according to Green and American, is not contemplated under the statute creating the Court of Claims. W. Va. Code, 14-2-1, et seq. This claim is based on Green's and American's misunderstanding of Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 302, 359 S.E.2d 124, 135 (1987). Green and American contend that in Mellon-Stuart we held the adoption of the West Virginia Rules of Civil Procedure by the Court of Claims was inconsistent with the statutory restrictions. They fail to recognize that Mellon-Stuart dealt with the limited question of whether Rule 13(a) of the West Virginia Rules of Civil Procedure on compulsory counterclaims applied to the State when it was sued in the Court of Claims.

We found Rule 13(a) did not apply to the State because W. Va. Code, 14-2-13(2) (1967), provided that the Court of Claims was authorized to hear matters "which may be asserted in the nature of a setoff or counterclaim on the part of the State or any state agency." The critical point made was that the word "may" used in the statute gave the State an option to assert a setoff or counterclaim, which overrode the mandatory language of Rule 13(a).

We did not hold in Mellon-Stuart that the West Virginia Rules of Civil Procedure could not be adopted by the Court of Claims. Indeed, in 1967 the Legislature authorized the

Court of Claims to adopt rules of procedure. W. Va. Code, 14-2-15 (1967).[16] The Court of Claims has adopted such rules under Rule 18 of the Rules of Practice and Procedure of the Court of Claims.[17]

There is no statutory provision applicable to the Court of Claims which forecloses an indemnitor from intervening under Rule 24(a)(2) of the West Virginia Rules of Civil Procedure.[18] This intervention procedure enables an indemnitor to have a determination as to whether under the express indemnity language a defense is required of the state agency which has been sued in the Court of Claims. We deem this type of intervention to be one of right where an intervenor has been put on notice by the indemnitee that it should assume the defense in the Court of Claims as occurred here. We have already pointed out that the failure to assume the defense after reasonable notice will result in a res judicata application of the judgment against the

---

[16] The current version of the statute authorizes the Court of Claims to adopt Rules of Procedure: "The court shall adopt and may from time to time amend Rules of Procedure[.]" W. Va. Code, 14-2-15 (1994). Furthermore, this section specifically authorizes the use of discovery "conducted pursuant to the Rules of Civil Procedure for trial courts of record, Rules 26 through 36."

[17] Rule 18 of the Rules of Practice and Procedure of the Court of Claims states: "The Rules of Civil Procedure will apply to the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary."

[18] Rule 24(a) of the Rules of Civil Procedure, states, in relevant part:

> "Intervention of Right.--Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

indemnitor. The federal courts, applying the substantially similar provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure, hold that, where res judicata principles will be applied in a subsequent proceeding, intervention of right is appropriate under Rule 24(a)(2). See generally, 74 A.L.R. Fed. 632 (1985).

The Ohio court's reasoning in City of Columbus, supra, is consistent with our line of cases that permits parties to bring in insurance carriers to determine whether a duty to defend is owed under an insurance policy. For example, in Christian v. Sizemore, 181 W. Va. 628, 383 S.E.2d 810 (1989), we authorized a plaintiff in conjunction with a civil action for personal injuries to include a count for declaratory judgment to determine if the tortfeasor's insurance carrier has coverage.[19] More recently, in State ex rel. State Farm Fire & Casualty Co. v. Madden, 192 W. Va. 155, 451 S.E.2d 721 (1994), we authorized the joining of the insurer as a defendant by the injured party where there is a claim that the insurer acted in bad faith or was guilty of unfair insurance practices.[20]

---

[19] Syllabus Points 3 and 4 of Christian, supra, state:

> "3. An injured plaintiff may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage.
>
> "4. A declaratory judgment claim with regard to the defendant's insurance coverage may be brought in the original personal injury suit rather than by way of a separate action."

[20] Syllabus Points 1 and 2 of State ex rel. State Farm v. Madden, supra, state:

> "1. Under rule 18(b), WVRCP [1978], an insurer may be joined as a defendant with the insured by an

Finally, and somewhat more relevant to the facts of this case, we held in State ex rel. Allstate Insurance Co. v. Karl, 190 W. Va. 176, 437 S.E.2d 749 (1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1302, 127 L.Ed.2d 653 (1994), that an uninsured or underinsured motorist carrier could under W. Va. Code, 33-6-31(d) (1988), file a response to the plaintiffs' action and raise policy defenses that it may have.[21] The public policy behind these procedural rules is to obtain in one suit a decision on all the various issues that may exist in the underlying claim. This results in judicial economy, thereby reducing costs to the litigants. It prevents a multiplicity of actions, which may result in inconsistent verdicts. This public policy is echoed in Rule 1 of the West Virginia Rules of Civil Procedure, which states that the civil rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Consequently, we hold that when the State or one of its agencies is sued in the Court of Claims and the State has an indemnity agreement with a third party indemnitor, upon

> injured plaintiff alleging various claims of bad faith and unfair insurance practices.
>
> "2. Under [R]ule 18(b), WVRCP [1978], as long as the claims against the insurer are bifurcated from those against the insured, and any discovery or proceedings against the insurer are stayed pending resolution of the underlying claim between the plaintiff and the insured, there is no undue prejudicial impact on a jury of joining in an original pleading or amending a pleading to assert bad faith or unfair insurance practices counts against an insurer in an original action against insured."

[21] Syllabus Point 14 of State ex rel. Allstate Insurance Co. v. Karl, supra, states: "The language of W. Va. Code, 33-6-31(d) (1988), that allows an uninsured or underinsured motorist carrier to answer a complaint in its own name is primarily designed to enable the carrier to raise policy defenses it may have against the plaintiff under its uninsured or underinsured policy."

reasonable notice by the State or its agency to defend under the indemnity agreement, the indemnitor must either defend the suit or intervene under Rule 24(a)(2) of the West Virginia Rules of Civil Procedure and assert any defenses it claims would enable it to avoid the duty to defend the indemnitee under the indemnity agreement. The failure to take either step forecloses the indemnitor from contesting the validity of the judgment rendered against the indemnitee on any grounds except a claim that the indemnitee allowed the judgment to be obtained by collusion in the Court of Claims.

Independent of the foregoing intervention procedure, we find Green and American were given reasonable notice of the claim by Greer, they were covered under the indemnity language in the contract, and they were offered the right to defend the claim. Under settled principles of res judicata and collateral estoppel, as outlined in Syllabus Points 3 and 4 of Mellon-Stuart, supra,[22] Green and American were bound in

---

[22] In Mellon-Stuart, 178 W. Va. at 298-99, 359 S.E.2d at 131-32, we made this summary of the principles of res judicata and collateral estoppel:

> "Very broadly, res judicata is a doctrine which bars the subsequent litigation of any cause of action which has been previously tried on the merits by a court of competent jurisdiction, and includes within its bar issues which might have been tried . . .
>
> "Collateral estoppel is a related doctrine, which applies to issues that were actually litigated in an earlier suit even though the causes of action are different. Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit. The central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit." (Footnotes omitted).

See also State ex rel. Hamrick v. LCS Servs., Inc., 186 W. Va. 702, 414 S.E.2d 620 (1992).

the declaratory judgment action by the judgment rendered against DOH in the Court of Claims:

> "3. An assessment of three factors is ordinarily made in determining whether res judicata and collateral estoppel may be applied to a hearing body: (1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body.
>
> "4. Res judicata or collateral estoppel effect may be given to matters litigated in the court of claims."

See also Vest v. Board of Educ. of the County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995)[23]; Central W. Va. Refuse, Inc. v. Public Serv. Comm'n of W. Va., 190 W. Va.

---

[23] In Syllabus Point 2 of Vest, supra, we expressed the standard for claim or issue preclusion as follows:

> "2. For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel."

416, 438 S.E.2d 596 (1993); Jones v. Glenville State College, 189 W. Va. 546, 433 S.E.2d 49 (1993).

VI.

In closing, we wish to make it clear that in affirming the judgment of the Circuit Court of Kanawha County, we find there exists no genuine issue of fact to be tried. The express indemnity language is found to be clear and unambiguous. Our existing indemnity law contained in Hill, supra, and Valloric, supra, requires the imposition against Green and American of the noncollusive Court of Claims judgment against DOH. While we recognize the right of an indemnitor to intervene under Rule 24(a)(2) in a suit brought against the State or one of its agencies in the Court of Claims, this right is not essential to our decision. Green and American failed to demonstrate that their alleged defenses were sufficiently viable to defeat the imposition of the judgment in the Circuit Court of Kanawha County. For the foregoing reasons, we affirm the judgment of the Circuit Court of Kanawha County.

Affirmed.

STATE OF WEST VIRGINIA

At a Regular Terms of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January, 1996, the following order was made and entered:

Fred VanKirk, West Virginia Commissioner
of Highways, Plaintiff Below, Appellee
vs.) No. 22791
Green Construction Company, an Iowa
corporation, and The American Insurance
Company, a Nebraska corporation,
Defendants Below, Appellants

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby, deny the prayer of the petitioner and doth hereby order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS,**
**Plaintiff,**

**vs.** **CIVIL ACTION NO. 92-C-1136**

**GREEN CONSTRUCTION COMPANY, an Iowa corporation, and THE AMERICAN INSURANCE COMPANY, a Nebraska corporation,**
**Defendants.**

## FINAL ORDER

On this the 22nd day of August, 1994, this action having been submitted for decision on its pleadings by the parties, the Court does hereby make the following findings of fact and conclusions of law:

### Findings of Fact

(1) On March 16, 1992 the plaintiff, Fred Vankirk, West Virginia Commissioner of Highways, filed the original complaint seeking a declaratory judgment to the effect that the defendants, Green Construction Company and The American Insurance Company, owed the plaintiff a duty to defend and/or indemnify the plaintiff against a claim filed by Elmo Greer & Sons, Inc. against the West Virginia Division of Highways in the West Virginia Court of Claims.

(2) On May 29, 1992 the plaintiff filed a Motion for Summary Judgment in the above-styled case.

(3) On December 11, 1992, the West Virginia Court of Claims issued its opinion in the underlying case of *Elmo*

*Greer & Sons, Inc. v. Division of Highways*, (Claim No. 87 - 444) which resulted in a judgment of One Million, Two Hundred Fourteen Thousand, Eighty-eight Dollars and Sixty-eight Cents ($1,214,088.68) in favor of Elmo Greer & Sons, Inc.

(4) Upon hearing on the Division of Highway's Motion to Reconsider, the Court of Claims affirmed its original decision on January 20, 1993.

(5) While pending decision on the plaintiff's Motion for Summary Judgment this case was inadvertently dismissed from the docket of this Court in June 1994. On July 20, 1994 this Court ordered reinstatement of this matter.

(6) Prior to the filing of this action and prior to the occurrence of the facts which gave rise to the Court of Claims case, the defendant, Green Construction Company, entered into a contractual agreement with the Division of Highways in which Green Construction Company agreed to save the Division of Highways harmless from all liability that might accrue by reason of the acts or negligence of Green Construction Company.

(7) The defendant, American Insurance Company, issued a surety bond posted for Green Construction Company to save and keep harmless the Division of Highways from all losses caused by Green Construction Company.

(8) In its opinion of December 11, 1992, the Court of Claims found that Elmo Greer & Sons, Inc. suffered damages that were the direct and proximate cause of delay occasioned by the defendant, Green Construction Company, and awarded judgment against the Division of Highways on that basis.

Conclusions of Law

(1) The defendant, Green Construction Company, by its contractual agreement, owes the Divison of Highways the duty to hold it harmless from any liability that might result by reason of Green's acts or negligence.

(2) The Division of Highways has suffered judgment in the Court of Claims in the amount of One Million, Two Hundred Fourteen Thousand, Eighty-eight Dollars and Sixty-eight Cents ($1,214,088.68) as a result of the acts or negligence of the defendant, Green Construction Company.

(3) Decision of the West Virginia Court of Claims may properly be given *res judicata* or *collateral estoppel* effect when that body acts as a judicial body as it did in the underlying case of *Elmo Greer & Sons, Inc. vs. Division of Highways* (Claim No. 87 - 444).

(4) There is no genuine issue of fact to be determined.

THEREFORE, after careful and impartial consideration, the Court does hereby ORDER that the plaintiff's Motion for Summary Judgment be and the same is, hereby granted.

Inasmuch as the Court of Claims has issued its opinion while the plaintiff's Motion for Summary Judgment was pending in this Court, it is further ORDERED that the plaintiff is awarded a judgment against the defendants, Green Construction Company and the American Insurance Company, in the amount of One Million, Two Hundred Fourteen Thousand, Eighty-eight Dollars and Sixty-Eight Cents ($1,214,088.68) together with interest thereon and the costs of this action.

It is further ORDERED that the Clerk of this Court send a certified copy of this Final Order to all parties or counsel of

record and that this matter be *dismissed and stricken from the docket of this Court.*

The Court reserves the objections and exceptions of any party or parties aggrieved by this Final Order.

DATED this the 22nd day of August, 1994.

**ENTER:**

/s/ Irene C. Berger
IRENE C. BERGER, CIRCUIT JUDGE

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FRED VANKIRK, WEST VIRGINIA
COMMISSIONER OF HIGHWAYS,

Plaintiff,

V. CIVIL ACTION
NO. 92-C-1136

GREEN CONSTRUCTION COMPANY,
AN IOWA CORPORATION, AND
THE AMERICAN INSURANCE COMPANY,
A NEBRASKA CORPORATION.

Defendants.

ORDER

On the 18th day of November 1994 came the parties by their counsel on the Defendants' Motion For Relief From Judgment from the Court's August 22, 1994 Final Order in this matter.

After reviewing the record and the memoranda filed in this matter, after listening to the arguments of counsel and after due deliberation, the Court has determined that its Order of August 22, 1994 was proper in all respects and the Defendants' Motion is therefore denied.

The objections and exceptions of the Defendant's are noted.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Enter this 22nd day of December, 1994.

/s/ Irene C. Berger
Irene C. Berger
Judge

**OPINION ISSUED DECEMBER 11, 1992**

**IN THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA**

**ELMO GREER & SONS, INC.**

**VS.**

**DIVISION OF HIGHWAYS**

**(CC-87-444)**

Carl L. Fletcher and Timothy L. Mayo, Attorneys at Law, for claimant.

Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

Elmo Greer & Sons, Inc., hereinafter referred to as "Greer," brought this action against the Division of Highways, hereinafter referred to as "respondent," for delay damages resulting from the failure of an adjacent contractor, Green Construction Company, Inc., hereinafter referred to as "Green," to comply with its contractual obligation in the construction of its portion of an "overlap" of the two projects. Both contractors were to construct sections of Interstate 64 east of Glade Creek in Raleigh County. Greer entered into a contract with respondent for the construction of Project No. 64-4 (71)123 on May 22, 1984. This contract involved major excavation and fill work, and the construction of a local service route bridge. Green had a contract with respondent to construct the adjacent project, Project No. X-341-64-123, C-2. Greer's contract provided for a scheduled completion date of June 30, 1986, and Greer completed the project on schedule.

As a part of Greer's contract, Greer was required to complete a major fill between stations 534+50 and 545+00. This landfill work could not begin until the adjacent contractor, Green, had installed a box culvert and special embankment work at the bottom elevations of the same cut. The projects overlapped at these stations. The Greer project was a very nearly "balanced project," meaning that the volume of material excavated on the project was equivalent to the amount necessary for the fills and only unsuitable material would be wasted. Since there was major rock excavation for Greer to complete and Greer could not begin the major fill portion of the project, Greer's performance was greatly impacted by the unavailability of the major cut. Greer was to place approximately 1,580,000 cubic yards of material in the fill over the box culvert and select embankment placed by Green.

Green's contract provided that a portion of its work be performed at the same stations. Green was to place a box culvert and special embankment at the lower elevations of the fill. This work was to be completed by October 31, 1984. The contracts for both parties (Greer and Green), provided that the contractors were to cooperate and coordinate with each other's work in order that each contractor would be able complete its respective contract on schedule.

On July 5, 1984, an agreement between Greer and Green was submitted to respondent to comply with the cooperation and coordination provision of their contracts. Greer had agreed to a 30-day extension of the deadline for Green to complete its work, the new deadline being December 1, 1984. In November 1984, it was apparent to both contractors and respondent that Green would not meet its December 1, 1984, deadline, and Greer notified respondent by letter that the delay would significantly alter its completion and

progress of its project. Thereafter, meetings were conducted on a monthly basis, and at each meeting respondent urged Greer to be prepared to begin its work on the fill as Green would be completing the box culvert and select embankment. Green finally completed its work in August 1985. In an attempt to cooperate with Green and with the respondent, Greer performed much of the embankment work as Green completed its work; therefore, Greer did not have full use of the fill area but did its work piecemeal. Greer cooperated and even performed a portion of Green's contractual obligation by placing embankment in the cut.

Greer provided official notice to respondent on January 23, 1985, that it intended to file a claim for the delay of its work on this project. The claim period begins with this January date. Greer alleges damages as a result of the delay in the amount of $3,211,602.59. The basis for the calculation of its damages is §109.4 of the Standard Specifications. The damages include labor, materials, and idle equipment costs. The total cost of the project was $10,272,644.64 and Greer was paid the sum of $7,061,042.05 for a difference of $3,211,602.59 which represents the amount claimed herein. Respondent contends that Greer is not entitled to recover for delay damages as Greer did not comply with the provisions of the Standard Specifications of Roads and Bridges §105.7 Cooperation Between Contractors, which states as follows:

> The Department reserves the right at any time to contract for and perform other or additional work on or near the work covered by the Contract.
>
> When separate Contracts are let within the limits of any one project, each contractor shall conduct his work so as not to interfere with or hinder the

progress or completion of the work being performed by other Contractors. Contractors working on the same project shall cooperate with each other as directed.

Each contractor involved shall assume all liability, financial or otherwise, in connection with his Contract and shall protect and save harmless the Department from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors working within the limits of the same project.

The Contractor shall arrange his work and shall place and dispose of the materials being used so as not to interfere with the operations of the other contractors within the limits of the same project. He shall join his work with that of the others in an acceptable manner and shall perform it in the proper sequence to that of the others.

In the event the Engineer finds that further coordination effort is necessary, he shall call a meeting of the contractors involved. After the meeting has been held, he may notify the Contractors of the action required of each and his decision shall be final.

Respondent also contends that Greer should have been successful in litigation which it brought directly against Green in federal court. The case against Green was dismissed by the Federal District Circuit Court whereupon Greer appealed to the U.S. Circuit Court of Appeals, which appeal was denied on September 10, 1991. As to the damage issue, respondent argues that there was no extra work performed by Greer, and, therefore, §109.4 of the Standard

Specifications should not be the basis for calculating the damages which were allegedly the result of the delay on the project. Respondent contends that Greer's damages should be limited to idle equipment costs as calculated by the respondent in the amount of $228,209.76.

As a result of the failure of Green to provide the completed fill to Greer in a timely manner, Greer encountered problems with the handing of common material and sand rock from areas on the project which required major excavation. Greer had to double handle material which would not have occurred if Greer had not been delayed on the fill at the major cut. Greer had many pieces of idle equipment on the project in anticipation of being able to begin its work in this cut. Greer also was delayed in its construction of a small bridge as a portion of the fill had to be completed to provide sufficient area for the construction of the bridge. When Greer was able to begin its work in the major cut area, it performed the work in stages and therefore extra equipment was needed and Greer had much less space in which to perform its work. The delay also forced Greer to work material during the winter months that was unsuitable at that time of the year which necessitated the use of extra equipment. In spite of all of these problems, Greer worked diligently to complete the project on schedule.

The evidence in this claim supports Greer's allegations that Green's delay in completing its work at the bottom of the overlap area delayed Greer causing an increase in its costs. Greer has established to the satisfaction of the Court that it cooperated to the best of its ability with Green. The Court also finds that Greer complied with §105.7 of the Specifications. It may be the responsibility of Green to "protect and save harmless the Department from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced" as a result of its actions on its

project. This is within the realm of possibilities for respondent to consider.

This Court is not impressed with respondent's contention that Greer's lack of success against Green in the suit brought by Greer in the Federal District Court was avoidable. It is much easier to use hindsight than foresight when reviewing actions brought by other parties. The Federal District Court and Circuit Court of Appeals appear to have dismissed Greer's action against Green on the theory that Greer did not establish its standing as a third party beneficiary as provided in West Virginia law. To suggest that amended pleadings may have overcome the issue of detrimental reliance is, at best, pure speculation. Greer did not have privity of contract with Green, but respondent certainly has. Respondent has a suit currently pending against Green in the Circuit Court of Kanawha County and it is anticipated that respondent will pursue this action once this Court has rendered it opinion in the instant claim.

As to the issue of damages incurred by Greer, the Court is of the opinion that the damages are limited to those directly and proximately caused by the delay rather than based upon the provisions in §109.4 of the Specifications. The Court agrees with respondent that the delayed work was included in the original contractual agreement. Greer was delayed in its performance of the contract, but the work was not changed in scope or manner. The Court, however, limits Greer to recovery of its overtime labor required to perform its contract, to idle equipment costs incurred during the delay period including the crane, and the additional B&O taxes and performance bond expenses. The overtime labor costs for December 1, 1984, through June, 1986 incurred by Greer were in the amount of $401,521.27 with the additional costs for Health and Welfare and Pension being $41,537.38. A

40% overhead allowance of $177,223.46 is allowed for a total amount of $620,282.11.

The calculation of idle equipment costs is always speculative as the issue arises as to whether additional equipment was really necessary on any project. The Court is satisfied with the amount that respondent has calculated for idle equipment which is the amount of $228,209.76; therefore, the Court will adopt this figure as a part of its award to Greer. The Court will also include the cost for the crane maintained on the project for construction of the bridge. The crane remained idle during a portion of the delay. The cost to Greer was $42,825.00.

Therefore, the Court makes an award to Greer in the sum of $891,316.87 for the delay.

The Court must next consider the issue of interest. The legal action brought against Green was litigated by Greer and Green for approximately three and one-half years from July 5, 1988, to December 10, 1991. It was not until the conclusion of this litigation that the action in the Court of Claims was placed upon its calendar for hearing. The Court is of opinion that interest shall be included for this period of time. Therefore, interest based upon the provisions in W. VA. Code §14-3-1 is awarded from the 151st day after July 2, 1986, which is November 29, 1986, to the date of issue of this opinion on December 11, 1992.

Accordingly, the Court makes an award to Greer in the amount of $891,316.87 plus interest in the amount of $322,771.81 for a total award of $1,214,088.68.

Award of $1,214,088.68.

**Excerpt from Contract between State and Green**

(4) CONTRACTOR agrees to conform to the laws of the State of West Virginia in reference to keeping the project open, and to all other legal requirements not mentioned herein, or specified: to keep all employees engaged on said work protected by the Workmen's Compensation Fund in compliance with the act of the Legislature of West Virginia known as the Workmen's Compensation Act, which is made a part hereof, and to save the DEPARTMENT harmless from all liability for damage to persons or property that may accrue during and by reason of the acts or negligence of the CONTRACTOR, his agents, employees, or subcontractors if there be such.

**State Standard Specifications**

## 107.14 RESPONSIBILITY FOR DAMAGE CLAIMS:

The Contractor shall indemnify and save harmless the Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of the Contractor; or because of any claims or amounts recovered from any infringements of patent, trademark, or copyright; or from any claims or amounts arising or recovered under the "Workmen's Compensation Act," or any other law, ordinance, order, or decree; and so much of the money due the Contractor under and by virtue of his Contract as may be considered necessary by the Department for such purpose may be retained for the use of the Department or, in case no money is due, his surety may be held until such suit or suits, action or actions, claim or claims for injuries or damages as aforesaid shall have been settled and suitable evidence to that effect furnished to the Department; except that money due the Contractor will not be withheld when the Contractor produces satisfactory evidence that he is adequately protected by public liability and property damage insurance.

## Contract Bond Excerpt

NOW, THEREFORE, if the said "principal" as contractor, shall in all respects well and truly comply with the terms and conditions of said contract, and his, their or its obligations thereunder, including the plans and specifications therein described and referred to, all of which are made a part hereof, and such alterations and modifications as may be made in said plans and specifications as therein provided, which alterations and modifications shall not operate to discharge the principal or surety on this bond, and said contractor shall well and truly, and in a manner satisfactory to the West Virginia Department of Highways, complete the work contracted for in accordance with the terms and conditions of said contract and within the completion date therein specified, and shall promptly pay in full to the persons entitled thereto for all materials, gas, oil, repairs, supplies, equipment, rental charges for equipment and charges for the use of equipment, and labor used by contractor in and about the performance of such contract, including such claims, services, and obligations against subcontractors, and shall save harmless the West Virginia Department of Highways and the State of West Virginia from any expense incurred through the failure of said contractor, including subcontractors, to complete the work as specified, and for any damages growing out of the carelessness or negligence of said contractor, his, their or its servants, agents and employees, or his subcontractors, their agents, servants, and employees, and shall fully pay off and discharge and secure the release of any and all mechanics' liens which may be placed upon said property by any subcontractor, laborer or material men, and shall also save and keep harmless the West Virginia Department of Highways and the State of West Virginia from all losses to it or them from any cause whatever including patent, trade-mark, and copyright infringements in the manner of

constructing said Road, then this obligation shall be null and void. Otherwise it shall remain in full force and effect.

Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

No. 95-1720

In The

# Supreme Court of the United States

October Term, 1995

GREEN CONSTRUCTION COMPANY AND THE AMERICAN INSURANCE COMPANY,

*Petitioners,*

v.

FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

*Respondent.*

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

## BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JEFF MILLER
Counsel of Record

ANTHONY G. HALKIAS
Legal Division
West Virginia Division
of Highways
Building 5, Room A519
1900 Kanawha Boulevard, East
Charleston, WV 25305-0430
(304) 558-2823

*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Where an indemnitor doing business with the State of West Virginia cannot be joined in an action in the West Virginia Court of Claims, but may intervene as a matter of right, and where the indemnitor has been vouched the defense by the State/indemnitee, but the indemnitor refuses either to intervene or to defend, can the indemnitor be precluded from disputing facts established in the action?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF CITED AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

A. Procedural Background ..... 1

B. Facts ..... 2

SUMMARY OF THE ARGUMENT ..... 4

REASONS FOR DENYING THE WRIT ..... 6

CONCLUSION ..... 15

APPENDIX – Text of Statutes and Rules Involved ..... App. 1

# TABLE OF CITED AUTHORITIES

Page

CASES

*Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31 (8th Cir. 1966) ..... 9

*Chase National Bank v. Norwalk*, 291 U.S. 431 (1934) .... 13

*Elmo Greer & Sons, Inc. v. Division of Highways*, No. CC-87-444 (W.Va.Ct. Cl. Dec. 11, 1992) ..... 2, 3, 4

*Hill v. Joseph T. Ryerson & Sons, Inc.*, 286 S.E.2d 296 (W. Va. 1980) ..... 10, 14

*Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727 (C.A.3d 1971) ..... 12

*Martin v. Wilks*, 490 U.S. 775 (1989) ..... 13, 14

*McCrossin v. W. Va. Board of Regents*, 355 S.E.2d 32 (W. Va. 1987) ..... 7

*Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124 (W. Va. 1987) ..... 7, 8, 9

*Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991) ..... 12, 13

*Valloric v. Dravo Corporation*, 357 S.E.2d 207 (W. Va. 1987) ..... 10

*VanKirk v. Green Construction Co.*, 466 S.E.2d 782 (W. Va. 1995) ..... 2, 4, 5, 7

STATUTES AND RULES INVOLVED

W. Va. Code § 14-2-13 (1967) ..... 6

W. Va. Code § 14-2-16 (1967) ..... 6

W. Va. R. Civ. P. 14 ..... 9, 10, 11

W. Va. R. Civ. P. 19 ..... 9, 10

TABLE OF CITED AUTHORITIES – Continued

Page

W. Va. R. Civ. P. 24 ..... 6

W. Va. R.C.C., Rule 18 ..... 6

OTHER AUTHORITIES

Restatement (Second) of Judgements § 57 .....9, 10

C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* .....9, 11, 12

## STATEMENT OF THE CASE

### PROCEDURAL BACKGROUND

Petitioners Green Construction Company ("Green") and The American Insurance Company ("American") appeal a decision of the West Virginia Supreme Court of Appeals affirming the judgement of the Circuit Court of Kanawha County, West Virginia. The Circuit Court held that Green and American owed a contractual duty to indemnify and hold harmless the Division of Highways ("Highways") from an award of judgment made in favor of Elmo Greer & Sons, Inc. ("Elmo Greer") in West Virginia Court of Claims action CC-87-444. In an opinion issued December 11, 1992, the Court of Claims made an award to Elmo Greer in the sum of $1,214,088.68. The parties in the circuit court action, Green, American and Highways, moved for summary judgment on the indemnification issue, and after oral arguments on June 12, 1992 and extensive briefing with affidavits, the Circuit Court, by Order entered August 22, 1994, granted summary judgment in favor of Highways and awarded Highways judgment against Green and American in the amount of $1,214,088.68. After further oral arguments at a hearing on November 18, 1994 and additional briefing by the parties, the Circuit Court denied Green and American's Motion for Relief from Judgement.[1]

---

[1] Petitioners' statement, *Petition, p. 11, repeated in Petition, note 10,* that the Circuit Court of Kanawha County gave preclusive effect to the Court of Claims decision "[w]ithout a hearing or any opportunity to amplify the proper legal effect" of that decision ignores these hearings and the extensive briefs, reply briefs and supplemental briefs by the parties.

The West Virginia Supreme Court of Appeals affirmed the judgement of the Circuit Court by opinion filed December 8, 1995, and denied Petitioners' Petition for Rehearing on January 24, 1996.

## FACTS

This case concerns the duty of Green and American to indemnify Highways for losses sustained by Highways as a result of Green Construction's breach of contract in failing to properly perform a road construction contract.[2] On May 22, 1984, Elmo Greer was awarded a contract by Highways for construction of Highway Project No. ID-64-4(71)123. The scheduled completion date was June 30, 1986. Green was to install a box culvert and perform special embankment work in the same area under its contract for Project No. ID-64-4(73)124. Except for a small area of overlap, the two projects differed both in location and in sequencing of work and times of completion for work items. Elmo Greer could not complete their project until Green's work was completed.

After several requests by Highways to Green that they comply with their contractual obligations, and after Highways granted deadline extensions to Green that were also not met, Elmo Greer agreed to help Green complete its job. Several errors made by Green were discovered by Elmo Greer when they began their project.

---

[2] *VanKirk v. Green Construction Co.*, 466 S.E.2d 782 (W. Va. 1995). See also *Elmo Greer & Sons, Inc. v. Division of Highways*, No. CC-87-444 (W.Va.Ct. Cl. Dec. 11, 1992)

Elmo Greer had to correct these errors before it could proceed. As a result of these delays by Green, *Elmo Greer & Sons, Inc.*, at 5-6, Elmo Greer suffered financial losses arising out of the delays in its own work and additional work it had to perform, causing a postponement of new projects and the carrying over of work into the new construction season.

Elmo Greer made a claim of $3,211,602.59 against Highways in the West Virginia Court of Claims. Highways' contract with Green included a save harmless clause in which Green agreed to save Highways harmless from liability that may accrue by reason of the acts or negligence of Green. In addition, American issued a surety bond posted for Green Construction Co., in which Green joined as principal, to save and keep harmless Highways from all losses caused by Green. However, neither Green nor American agreed to defend Highways when requested, nor did they appear and dispute their obligation to indemnify Highways.

Contrary to the implication in Petitioners' Statement of the Case, *Petition, p. 2,* neither Green nor American informed Highways at the time of tender that their decision to decline tender of the defense was based on the belief that Highways' failure to coordinate was the cause of Greer's damages, but only later during the Circuit Court action did they raise the issue. Petitioners' representation, *Petition, p. 5,* that Highways took no action to

address the coordination of contractor work is also incorrect.[3]

## SUMMARY OF THE ARGUMENT

Throughout much of their brief Petitioners pose a false dilemma. They argue that as indemnitors with an alleged conflict of interest with the indemnitee, they could not both accept tender of the defense of the indemnitee and at the same time protect their own interests by showing that the indemnitee's fault defeats or offsets the indemnification obligation. As the West Virginia Supreme Court of Appeals noted, Petitioners could elect which course to take: accept tender of the defense or intervene and dispute the existence and extent of the obligation to indemnify. Petitioner's dilemma arises out of their mischaracterization of the obligations as conjunctive rather than disjunctive.

Petitioners further argue the proposition that where an indemnitor alleges a conflict of interest with an indemnitee as to issues forming the basis of the indemnitee's liability to a third party, and does not appear, due process

---

[3] *VanKirk*, 466 S.E.2d at 784: "As the result of delays, DOH asked Green several times to comply with its contractual obligations. DOH granted deadline extensions to Green that were not met." See also *Elmo Greer & Sons, Inc. v. Division of Highways*, No. CC-87-444 (W.Va.Ct. Cl. Dec. 11, 1992), text at *Petition*, Appendix, at 39a: " . . . meetings were conducted on a monthly basis, and at each meeting respondent [Highways] urged Greer to be prepared to begin its work on the fill as Green would be completing the box culvert and select embankment."

requires that the indemnitor only be precluded as to those issues where there was no conflict. However, legal commentators and authorities recognize the need for an exception to this principle where, due to jurisdictional or other limitations, the indemnitee cannot implead or join the indemnitor in the principal action. Where, as here, neither the indemnitee nor the party claiming against the indemnitee can hail the indemnitor into the forum with jurisdiction to hear the claim, and where the indemnitor declines tender of the defense and refuses to intervene and litigate facts which it alleges defeat indemnification, so that the indemnitee is exposed to inconsistent judgements, it is fair to give preclusive effect to issues decided in that forum.

Finally, the Petitioners overstate the reach and implications of the opinion of the West Virginia Supreme Court. That Court's holding[4] is expressly limited to proceedings in the West Virginia Court of Claims, a court with limited jurisdiction and one, unlike other state and federal courts, in which impleader and joinder are not available to the State/indemnitee.

---

[4] " . . . we hold that when the State or one of its agencies is sued in the Court of Claims and the State has an indemnity agreement with a third party indemnitor, upon reasonable notice given by the State or its agency to defend under the indemnity agreement, the indemnitor must either defend the suit or intervene under Rule 24(a)(2) of the West Virginia Rules of Civil Procedure and assert any defenses it claims would enable it to avoid the duty to defend the indemnitee under the indemnity agreement." *VanKirk*, 466 S.E.2d at 793.

## REASONS FOR DENYING THE WRIT

### A FALSE DILEMMA POSED

The very heart of Petitioners' argument is their assertion that they were denied their day in Court in violation of due process. They acknowledge that they received timely notice of Elmo Greer's claim against Highways in the Court of Claims and that Highways tendered the defense of the claim. They argue, however, that taking part in the proceeding would not afford them a meaningful opportunity to defend because they faced an irreconcilable conflict in both defending Highways against Elmo Greer's claims and asserting their claim that no indemnification was owed Highways because Highways' acts or omissions caused Elmo Greer's harm.

Petitioners' position is directly contrary to West Virginia statutory law, the Rules of the West Virginia Court of Claims, the West Virginia Rules of Civil Procedure and past holdings of the West Virginia Supreme Court of Appeals. West Virginia Code § 14-2-13(1) provides that the Court of Claims shall have jurisdiction of " . . . [c]laims and demands . . . ex contractu . . . against the State or any of its agencies. . . . " The same article further provides: "The court shall so conduct the hearing as to disclose *all material facts and issues of liability*. . . . " W. Va. Code § 14-2-16(4) (emphasis added). West Virginia Court of Claims R. Prac & Pro., Rule 18 expressly states that "[t]he Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary." Thus, as the West Virginia Supreme Court observed, W. Va.

Rule Civ. P. Rule 24 intervention was available to Petitioners to raise in the Court of Claims, investigate through discovery, and address at hearing the issues it claims were precluded.[5]

The West Virginia Supreme Court of Appeals has unequivocally stated, in Syllabus Point 2 of *McCrossin v. W. Va. Board of Regents*, 355 S.E.2d 32 (W. Va. 1987) that: "[a] knowledgeable party contracting with a state agency has, in effect, agreed to submit *any disputes* with the contracting state agency for resolution by the court of claims." (emphasis added) In *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 133 (W. Va. 1987), the West Virginia Supreme Court observed:

> Though the court of claims is not a judicial body, it clearly operates in a judicial capacity. Its judges are lawyers, who serve as neutral and detached decision-makers. Longstanding due process protections such as notice and an opportunity to be heard are scrupulously applied. The court has adopted the West Virginia Rules of Civil Procedure where they are not inconsistent with its own procedures. Moreover, the judges make legal and factual findings from which they render a final and binding decision. Thus, the

---

[5] The court stated: "This intervention procedure enables an indemnitor to have a determination as to whether under the express indemnity language a defense is required of the state agency which has been sued in the Court of Claims. We deem this type of intervention to be one of right where an intervenor has been put on notice by the indemnitee that it should assume the defense in the Court of Claims as occurred here." *VanKirk*, 466 S.E.2d 782, 792. However, the court neither expressly nor impliedly recognizes in *the State* or *Greer* similar rights to join or implead Green and American.

> question of whether the court acts as a judicial body must be answered in the affirmative. . . . We note that the hearings conducted before the court of claims possess all of the indicia of an adversarial judicial proceeding. . . . The parties had available to them various methods of pre-trial discovery, including interrogatories and depositions. Rule 14, Ct.Cl.R.Prac. & Pro. They were authorized to produce witnesses and exhibits on their behalf, to procure evidence through compulsory process, and to cross-examine the witnesses of opposing parties.

In *Mellon-Stuart*, the underlying court of claims case involved two contractors as parties claiming against the State, and a prominent issue in that case, as in the instant case, was the responsibility for coordinating the various prime contractors. Nothing in the instant case, save Petitioners' adamant refusal after notice, prevented Petitioners from intervening in the court of claims action, complying with their contractual obligation to defend Highways to the extent consistent with their own interests, and raising issues concerning indemnification and apportionment of liability between Petitioners and Highways.

Moreover, the West Virginia Supreme Court, in its decision below, recognized no obligation of Petitioners or similarly situated indemnitors to accept tender of the defense where a conflict was alleged. Petitioners could in the alternative appear and dispute those issues of fact and law they claimed diminished or extinguished the indemnity obligation.

## BINDING AN INDEMNITOR WHO REFUSES TO APPEAR

While noting that the West Virginia Court of Claims has adopted the Rules of Civil Procedure, 359 S.E.2d at 133, the *Mellon-Stuart* Court went on to observe that such adoption "does not mean that these rules can supercede statutory provisions governing the court. . . . [I]t may not adopt rules which are inconsistent with or alter its statutory authority." 359 S.E.2d at 135. Consequently, since that court has jurisdiction only of claims against the State, the State may be hailed into, but cannot hail other parties into, proceedings before the court. This jurisdictional limitation on Rule 14 impleader and Rule 19 joinder places the State, as indemnitee, in a position where it must answer to claims against it in the Court of Claims but has no means to join or implead an indemnitor in the same proceeding for determination of issues related to the duty to indemnify.

Petitioners argue, *Petition*, pages 14-22, that where an indemnitor alleges a conflict of interest with an indemnitee as to issues forming the basis of the indemnitee's liability to a third party, and does not appear in the original action, due process requires that the indemnitor only be precluded as to those issues where there was no conflict. This general proposition finds support in a number of court opinions and commentaries,[6] as Petitioners note, and is consistent with pronouncements of

---

[6] See, e.g., *Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31, 35 (8th Cir. 1966); Restatement (Second) of Judgements § 57; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4452.

the West Virginia Supreme Court.[7] Significantly, Petitioners recognize, *Petition*, at pages 21-22, that:

> . . . Rule 14 impleader and Rule 19 joinder enable parties to a proceeding to bring third parties into a proceeding, and thus bind them to the judgement with well settled principles of estoppel. Importantly, however, the onus of Rules 14 and 19 rests upon the existing parties to the proceeding, precisely where the onus belongs if estoppel is desired. The burden of joinder, if desired, *should* be borne by the party seeking to adjudicate the interests of an absent party.

Where, however, the parties to the proceeding cannot join or implead the absent party, as in the proceeding in the Court of Claims, below, the burden becomes a bar, and the equities shift.

Restatement (Second) of Judgements § 57 (1982), p. 82-83, provides:

> When the conflict of interest makes it inappropriate for the indemnitor to assume defense of the indemnitee, the indemnitee faces a serious risk that he may unjustly lose his indemnity protection. The indemnitor is not bound by the determinations against the indemnitee, nor estopped from contending that the indemnitee was improperly held liable to the injured party. Hence, it is possible that there will be inconsistent determinations of the issues common to the injured person's action against the indemnitee

---

[7] See, e.g., *Hill v. Joseph T. Ryerson & Sons, Inc.*, 286 S.E.2d 296 (W. Va. 1980); *Valloric v. Dravo Corporation*, 357 S.E.2d 207 (W. Va. 1987).

> and the latter's action against the indemnitor, with the result that the indemnitee is held liable to the injured person but also held not entitled to indemnification. The indemnitee's proper remedy in this situation is to implead the indemnitor, a remedy available in the modern procedure now adopted in most jurisdictions. *In some circumstances, impleader may be unavailing unless the indemnitor voluntarily submits to the jurisdiction of the court. This can occur as a result of service of process limitations or, especially with regard to insurers, when the indemnitor successfully asserts that he cannot be sued until the claim against the indemnitee is reduced to judgement. Such a refusal to submit to jurisdiction or abide by the outcome of the action against the indemnitee may be a proper basis for estopping the indemnitor from later contesting the determinations in the principal action.* (emphasis added)

See also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4452, "Duty to Participate," at page 445 (1981):

> Strong arguments can be made that preclusion by voucher should be unavailable *whenever interpleader is possible.* (emphasis added)

continuing, *Id.*, at note 11:

> After noting that a conflict of interests between the defendant and the warrantor made vouching inappropriate, Judge Aldisert has commented that while vouching remains 'marginally viable' following adoption of Rule 14 impleader procedures, the need for consistent and efficient litigation is better served by impleader, *and has noted that it has at least been suggested that vouching might be limited to cases in which impleader is*

> *not possible. Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727, 735 & nn. 14, 15 (C.A.3d 1971). (emphasis added)

and

> Vouching need be preserved only for cases in which lack of personal jurisdiction or other limitations make impleader unavailable.

18 Wright, *supra*, at 445-446, continuing, at note 12:

> . . . . As modern transactional bases of personal jurisdiction come to be perfected, it seems likely that personal jurisdiction should be available in almost all of the circumstances that would support vouching. *Other limitations may restrict impleader procedure as well, particularly in state practice*. . . . (emphasis added)

*Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991), relied on by Petitioners, *Petition*, p. 19, is inapposite. In that case Universal American Barge Co., a shipper, contracted to carry bags of flower to Egypt. In a separate agreement the shipper contracted with J-Chem, Inc. to fumigate the cargo to prevent insect infestation. During transport the fumigation pellets settled together in the hold of the ship, and a chemical reaction occurred which caused a fire. The Egyptian purchaser sought arbitration under the terms of the contract with the shipper, and the shipper tendered defense of the claim to the fumigator.

Unlike the instant case, which dealt with express contractual indemnification, *Universal American Barge* involved a claim for implied indemnification by the indemnitee/shipper based on warranty of workmanlike

performance and common-law tort indemnification principles. More significantly, however, the original proceeding in *Universal American Barge* was an arbitration held pursuant to a contractual agreement between the shipper and the claimant to which the putative indemnitor (the fumigator) was not a party. Although the shipper/indemnitee tendered defense of the claim against it to the fumigator, no right of intervention *as a party* was available to the fumigator/indemnitor. It could only stand in the shoes of the shipper/indemnitee. Thus the fumigator/indemnitor lacked the choice available to Green and American in the Court of Claims proceeding below to accept tender of the defense or intervene as parties and assert issues that relieved them of the indemnity obligation.

Similarly, *Martin v. Wilks*, 490 U.S. 775 (1989), is distinguishable at a number of significant points. *Martin* dealt not with express contractual indemnity, nor even with a relationship of implied indemnity. The preclusion resisted in *Martin* was premised on a consent decree rather than a judicial finding of fact. Most importantly, the denial of issue preclusion was founded in the ability of the party seeking preclusion to employ third party practice to join or implead the party sought to be precluded.[8] Highways had no such ability in the court of claims proceeding below.

---

[8] Chief Justice Rehnquist quotes with approval from *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934): " '. . . . *Unless duly summoned to appear in a legal proceeding*, a person not a privy may rest assured that a judgement recovered therein will not affect his legal rights,' " (emphasis added by this Respondent)

## LIMITED APPLICABILITY OF THE DECISION BELOW

The West Virginia Supreme Court is cognizant of and sensitive to due process concerns raised by Petitioners. Indeed, that court, in an implied indemnity case, *Hill v. Joseph T. Ryerson & Sons, Inc.*, 286 S.E.2d 296 (W. Va. 1980), recognized that where an indemnitor *"has not been impleaded by an indemnitee* into the original suit brought against the indemnitee by the plaintiff, then the indemnitor is not bound by the judgement rendered against the indemnitee in the plaintiff's action." *Id.* at 302 (emphasis added). Unlike the instant case, in *Hill* the original proceeding was one where joinder and impleader were available to the party seeking preclusion. The *Hill* Court went on to conclude that where both notice and an opportunity to defend is not provided, the indemnitor may litigate the measure of damages recovered from the indemnitee in the former action and may set up any other defense available.

In the instant case the court has crafted a narrow holding expressly applying to proceedings in the West Virginia Court of Claims, a court where claimants and the

---

*Martin*, at 763, continuing, *Id.*, at 765, "The parties to a lawsuit presumably know better than anyone else the nature and scope of the relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, *to place on them a burden of bringing in additional parties* where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the 'impermissible collateral attack' doctrine – the attribution of preclusive effect to a failure to intervene – is therefore quite inconsistent with *Rule 19* and Rule 24 practice." (emphasis added)

State lack joinder and impleader safeguards. The court's holding does not address courts of general jurisdiction where third party practice tools are available to all parties. This limited holding is in keeping with the recognized exception to the general rule proscribing the giving of preclusive effect to issues determined in the absence of an indemnitor, where that indemnitor had notice and an opportunity to appear and litigate issues wherein its interests conflicted with those of the indemnitee.

In addition to promoting finality of judgements and economic use of judicial resources, the decision of the West Virginia Supreme Court strikes a fair and equitable balance between the burden on a contractual indemnitor of mandatory intervention, on the one hand, and the inability of an indemnitee without power to join or implead the indemnitor to protect its interest on the other.

## CONCLUSION

For the forgoing reasons Respondent, the West Virginia Commissioner of Highways, prays that this Honorable Court DENY THE WRIT.

Respectfully submitted,

JEFF MILLER
(Counsel of Record)
ANTHONY G. HALKIAS
W. Va. Division of Highways
Room A519, Building Five
1900 Kanawha Boulevard
East Charleston, West Virginia
25305-0430
Telephone No. (304) 558-2823

*Attorneys for Respondent*

## APPENDIX – TEXT OF STATUTES AND RULES INVOLVED

### OFFICIAL CODE OF WEST VIRGINIA, 1931, as amended:
### ARTICLE 2 – CLAIMS AGAINST THE STATE:

**(cited in pertinent part)**

**§ 14-2-13. Jurisdiction of the court [of claims].**

The jurisdiction of the court, except for the claims excluded by section fourteen [§ 14-2-14], shall extend to the following matters:

1) Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination. (1953, c. 18; 1967, c. 27.)

**§ 14-2-15. Rules of practice and procedure.**

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims.

. . .

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claim.

**§ 14-2-16. Regular procedure.**

The regular procedure for the consideration of claims shall be substantially as follows:

. . .

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

**WEST VIRGINIA COURT OF CLAIMS RULES OF PRACTICE AND PROCEDURE:**

**Rule 18. Application of Rules of Civil Procedure.**

The Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary.

MOTION FILED
MAY 23 1996

No. 95-1720

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,
*Petitioners,*

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,
*Respondent.*

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
*(Counsel of Record)*
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996 Counsel for *Amici Curiae*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

**No. 95-1720**

---

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

*Petitioners,*

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

*Respondent.*

---

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

---

## MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

---

Pursuant to Rule 37.2 of this Court, the American Insurance Association and the Surety Association of America respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of *Certiorari*. Counsel for petitioners has consented to the filing of this brief;

counsel for respondent has refused consent, thus necessitating the filing of this motion.

The American Insurance Association (AIA) is a national trade organization representing 270 companies writing property and casualty insurance in every state and jurisdiction. These companies provide 27 percent of all property and casualty insurance underwritten in the United States. AIA companies are affiliated with 79,000 independent insurance agents nationwide. A substantial portion of AIA member companies' business is commercial liability insurance -- the coverage that enables American businesses to provide the goods, services, jobs and investments vital to the country's economic health.

The Surety Association of America (SAA) consists of 662 members that underwrite surety and fidelity bonds. Each of SAA's member companies is licensed to write surety or fidelity bonds in at least one state. SAA is licensed and regulated as either a rating or advisory organization by all states.

The due process issues raised by the petition affect scores of commercial transactions which are part of the daily business life of the Nation. Because of the distinct perspective that AIA and SAA can offer with respect to third-party liability questions, and because our members have a substantial interest in the outcome of this litigation, our participation should assist the Court in determining that the petition should be granted.

Accordingly, AIA and SAA request leave to participate in this case by filing the attached brief.

Respectfully submitted,

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
*(Counsel of Record)*
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . ii

INTERESTS OF *AMICI CURIAE* . . . . . 1

INTRODUCTION . . . . . 2

REASONS FOR GRANTING THE WRIT . . . . . 5

I. CONFLICTS OF INTEREST ARE A SERIOUS AND FREQUENTLY RECURRING PROBLEM IN VOUCHING CASES . . . . 5

II. DUE PROCESS PROHIBITS PRECLUDING AN INDEMNITOR BY A JUDGMENT OBTAINED AGAINST AN INDEMNITEE WHERE THE INTERESTS OF THE TWO ARE IN CONFLICT . . . . . 8

CONCLUSION . . . . . 17

## TABLE OF AUTHORITIES

Page

CASES:

*Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31 (CA8 1966) . . . . . 14

*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) . . . . . 10

*Chase Nat. Bank v. City of Norwalk*, 291 U.S. 431 (1934) . . . . . 9

*Farm Bureau Mut. Automobile Ins. Co. v. Hammer*, 177 F.2d 793 (CA 1949), *cert.denied*, 339 U.S. 914 (1950) . . . . . 7,14

*Ferguson v. Birmingham Fire Ins.Co.*, 460 P.2d 342 (Or. 1969)(*en banc*) . . . . . 15

*Hansberry v. Lee*, 311 U.S. 32 (1940) . . . . . 8,11

*Hoskins v. Hotel Randolph Co.*, 211 N.W. 423 (Iowa 1926), *cert. denied*, 275 566 (1927) . . . . . 6

*Howell v. Richardson*, 544 N.E.2d 878 (Ohio 1989) . . . 15

*Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727 (CA3 1971) . . . 14

*Karas v. Snell*, 142 N.E.2d 46 (Ill. 1957) . . . . . 15

*Martin v. Wilks*, 490 U.S. 755 (1989) . . . . . 8,10

**TABLE OF AUTHORITIES** -- *continued*


Page

*Miller v. United States Fidelity & Casualty Co.*, 197 N.E. 75 (Mass. 1935) . . . . . 15

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) . . . . . 10

*SCAC Transport (USA) Inc. v. Danaos*, 845 F.2d 1157 (CA2 1988) . . . . . 14

*Stout v. Grain Dealers Mut. Ins. Co.*, 307 F.2d 521 (CA4 1962) . . . . . 14

*Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.d. 1131 (CA5 1991) . . . . . 7,13,14

*Vaksman v. Zurich General Accident & Liability Ins. Co.*, 94 A.2d. 186 (Pa. Super. Ct. 1953) . . . . . 16

*Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316 (1986) . . . . . 3

*Zenith Radio Corp. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) . . . . . 9

CONSTITUTION & RULES:

U.S. CONST. amend. XIV § 1 . . . . . 8,9

Fed.R.Civ.P. 14 . . . . . 9

## TABLE OF AUTHORITIES -- *continued*


Page

Fed.R.Civ.P. 19 . . . . . 9

Fed.R.Civ.P. 23(a) . . . . . 12

W.Va.Civ.P. 14 . . . . . 9

W.Va.Civ.P. 19 . . . . . 9


OTHER MATERIALS:


AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (1ST) § 107 (1942) . . . . . 15

AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (2ND) § 57 (1982) . . . . . *passim*

Ronan E. Degnan & Alan J. Barton, *Vouching to Quality Warranty:Case Law and Commercial Code*, 51 CALIF.L.REV. 471 (1963) . . . . . 6

1B JAMES WM. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.405 (d. ed. 1995) . . . . . 14

Note, *Development of the Common Law Rule Making a Judgment Conclusive Against Warrantors and Indemnitors*, 34 VA.L.REV. 321 (1948) . . . . . 2

Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995) . . . . . 7

18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452 (1981) . . . . . *passim*

UNIFORM COMMERCIAL CODE § 2-607(5)(a) . . . . . 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

**No. 95-1720**

---

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

*Petitioners,*

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

*Respondent.*

---

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

---

## BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

### INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out fully in the preceding motion. The motion indicates that petitioners, but not respondent, have consented to the filing of this brief. A letter of consent from petitioners has been lodged with the Clerk.

## INTRODUCTION

The prompt resolution of the due process issues raised by the petition is a matter of crucial importance, not just to the insurance and surety industries, but to industries from a variety of commercial sectors in which the practice of vouching is commonly employed. Vouching can occur in any situation in which one party has an obligation to indemnify another. The classic vouching transaction has three parties: A plaintiff asserting a substantive claim; a defendant/indemnitee against whom the plaintiff is asserting the claim; and an indemnitor alleged to be liable to the defendant under the plaintiff's claim.

Vouching is the practice by which the defendant/indemnitee notifies the indemnitor of the defendant's view that the plaintiff's claim is covered by the indemnity or warranty obligation of the indemnitor. By the standards of modern civil procedure, which include well-defined opportunities for impleader and joinder, vouching is oddly anachronistic because it subjects a *nonparty* to the judgment of a court. The circumstances in which that result can be enforced without violating due process have sharply divided lower courts.

A. Vouching apparently originated in disputes about title to real and personal property. If a purchaser of land found its title questioned by a third party, the purchaser would "vouch" its seller to assume defense of the lawsuit. If the seller (warrantor) did not appear to defend, the seller generally would be bound by a judgment that the third party (plaintiff) obtained against the purchaser (warrantee). *See* Note, *Development of the Common Law Rule Making a Judgment Conclusive Against Warrantors and Indemnitors*, 34 VA. L. REV. 321, 322-23 (1948)

(tracing that practice to a seventh century statute of King Hlothhaere of Kent).

The traditional vouching rules have been carried forward into modern practice with only minor adjustments. *See, e.g.*, 2 AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (2D) § 57, at 76-77 (1982) (restating modern principles of vouching); U.C.C. § 2-607(5)(a) (codifying procedures under which purchasers of personal property vouch-in sellers that gave warranties at the time of the sale). This Court's only pronouncement on the subject confirmed the traditional rule articulated above. *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316 (1896).[1]

Through the centuries, the practice of vouching has spread from the relatively narrow setting in which it originated to a variety of contexts.[2] Thus, it is now common for defendants to use vouching in any situation where a third party has an obligation to indemnify, whether the obligation to indemnify arises from warranties made by the third parties or from a contractual indemnity obligation.

B. Conflicts of interest can, and frequently do, arise in any context in which vouching is utilized. Particularly

---

1 As leading commentators have recognized, the *Washington Gaslight* case did not examine the issues presented here. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452, at 441 n.2 (1981).

2 *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452, at 440 (discussing how "[v]ouching practice has been extended, in an uncertain fashion, to a wide variety of relationships").

common opportunities for conflicts involve disputes between manufacturers and retail sellers of personal property, disputes between warrantors and warrantees, and disputes between insurers and insureds. The breadth of commercial transactions in which conflicts of interest underlie third-party liability underscores the importance of this issue -- and highlights the gravity of the offense to due process which such conflicts create.

A core tenet of due process is that those who are not parties to an action generally are not to be bound by the judgment in that action. This rule holds even if the nonparty has notice of the action and understands that the action raises issues of interest to the nonparty. To bind the nonparty to a judgment, one of the parties ordinarily must have joined the nonparty through available procedural devices.

This Court has recognized a variety of exceptions to that rule, but they involve circumstances where the relationship between party and nonparty is sufficient to justify an inference that the party adequately would represent the interests of the nonparty. None of these exceptions can apply in cases, like this one, that present significant conflict between the voucher and the vouchee.

In such a case, the plaintiff can impose liability on the defendant for two logically separate reasons. If one reason is advanced, the plaintiff's recovery will fall within the scope of the indemnity; if another is advanced, the recovery will fall outside the scope of the indemnity. Thus, the defendant has an interest in ensuring that the reason advanced by the plaintiff is one that gives rise to the indemnity, while the indemnitor has a contrary interest. For example, a defendant may offer to settle a case on a theory that compels the indemnity. Or a defendant

may put on a weaker defense anticipating the ultimate liability of the vouchee/indemnitor. In these situations -- and any number of others that are easily imagined -- the defendant cannot fairly represent the interests of the indemnitor. As recognized by several courts of appeals and the *Restatement of Judgments (2d)*, *post* at 12-15, this type of dual-allegation scenario is the classic case in which preclusion of the vouchee/indemnitor is inappropriate.

## REASONS FOR GRANTING THE WRIT

### I. CONFLICTS OF INTEREST ARE A SERIOUS AND FREQUENTLY RECURRING PROBLEM IN VOUCHING CASES.

As noted, the most persistent problem with vouching has been the difficulties that arise when the indemnitor and indemnitee have conflicting interests in the resolution of the plaintiff's underlying action against the defendant/indemnitee. The severity of that problem is magnified because of the multiplicity of areas where conflicts materialize. Three examples illustrate the diversity of cases in which the problem occurs.

One of the most common factual settings for vouching (closely akin to the original use of the doctrine) involves claims related to defects in personal property. For example, a leading vouching case is an early products-liability dispute arising out of an elevator accident. The owner of the elevator vouched-in the manufacturer (Otis Elevator Co.) to defend the ensuing litigation. The conflict of interest between the owner and the manufacturer became clear when Otis thoroughly defended against allegations that it had been negligent in designing the elevator. Otis did not, however, present any substan-

tial defense against claims that the owner had negligently repaired and serviced the elevator. Thus, Otis's defense served to protect its interests, at the expense of the interests of the owner (who would have been liable for damages caused by its own negligence). *Hoskins* v. *Hotel Randolph Co.*, 211 N.W. 423 (Iowa 1926), *cert. denied*, 275 U.S. 566 (1927); *see* Ronan E. Degnan & Alan J. Barton, *Vouching to Quality Warranty: Case Law and Commercial Code*, 51 CALIF. L. REV. 471, 490-92 (1963) (discussing the conflicting interests of the manufacturer in the *Hoskins* case).

Conflicts of interest also arise frequently in cases where accidents occur in situations that arguably implicate express or implied warranties. One prominent example arose out of the mishandling of a ship's cargo that led to the cargo catching fire during the ship's voyage. The fire resulted in a claim by the owner of the cargo (an agency of the Egyptian government) against the owner of the barge on which the fire occurred. After the owner was held liable for the damage, it sued the company that had fumigated the cargo before the voyage, claiming that the fumigator was liable for the damages based on an implied marine warranty of workmanlike performance. The conflict arose in that case because the cause of the fire was unclear. It could have been caused either by the negligence of the owner in operating the barge or by the negligence of the fumigator. When the owner defended the lawsuit, it had a strong incentive to defend against the claim that it had acted negligently (for which it would be directly liable), but a diminished incentive to defend against claims that the fumigation had been negligent (because the fumigator would have to indemnify the owner for any damages assessed on that basis). That conflict led the Fifth Circuit to hold that the fumigator was not bound by a judgment against the

owner. *See Universal American Barge Corp.* v. *J-Chem, Inc.*, 946 F.2d 1131, 1134-35, 1139-42 (CA5 1991).

The third example is the most typical in current commercial litigation: Liability insurance disputes. One well-known case in this area arose when a driver intentionally drove his truck into another car; the action killed one of the car's occupants and injured two others. The insurance policy for the truck driver did not extend to damages caused by assault and battery. Thus, the insurance company's interests were advanced by an argument that the incident involved an assault and battery, for which the insurer would not be responsible. The interests of the insured, on the other hand, called for an argument that the incident was caused by conduct that was only negligent. In light of that conflict, the Fourth Circuit held that the insurer was not bound by judgments that the injured parties obtained against the tortfeasor/defendant. *See Farm Bureau Mut. Automobile Ins. Co.* v. *Hammer*, 177 F.2d 793, 798-801 (CA4 1949), *cert. denied*, 339 U.S. 914 (1950).[3]

The spectrum of commercial settings in which conflicts of interest bear upon nonparty liability demonstrates the pervasiveness of the problem raised by this issue, and commends it to the Court's review. As shown in Section II, the issue requires the Court's review because a vital principle of constitutional law is in play: These quite ordinary commercial activities routinely violate the borders of due process.

---

3 For an illuminating list of examples of conflicting interests of insurers and their insureds, see Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 258-60 (1995).

## II. DUE PROCESS PROHIBITS PRECLUDING AN INDEMNITOR BY A JUDGMENT OBTAINED AGAINST AN INDEMNITEE WHERE THE INTERESTS OF THE TWO ARE IN CONFLICT.

The decision of the Supreme Court of Appeals of West Virginia violates the Due Process Clause of the Fourteenth Amendment because it contravenes fundamental precepts of civil procedure. The Due Process Clause does not permit the States to deprive a person of property on the basis of a judgment in a proceeding to which the person was not a party, unless that person's interests were represented in that proceeding.

A. "The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound." 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4449, at 411. Notice of an action is not enough to bind somebody to the judgment in a case to which he is not a party. Rather, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989). With very limited exceptions (which we discuss below), this Court repeatedly has relied on that axiom as the foundation of its jurisprudence on the effects of judgments. Thus, as the Court explained in *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940) (citations omitted):

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such

> circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requir[e].

*See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

The "process" that is "due" under Section 1 of the Fourteenth Amendment is formal service and joinder to a lawsuit, not informal written or telephonic notice. As Justice Brandeis put it:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

*Chase Nat. Bank* v. *City of Norwalk*, 291 U.S. 431, 441 (1934).

If a party already in litigation wants another to be bound by a judgment in that litigation, the litigating party has a clear and simple remedy: Bring the outsider into the existing litigation. *See* FED. R. CIV. P. 14, 19; W. VA. CIV. P. 14, 19. That approach is desirable not only because of basic principles of fairness, but also because of the relative positions of the parties. It is more efficient to require parties to a lawsuit to join third parties

who are needed to make relief effective, than to obligate parties who are not joined to judge whether they should intervene:

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief should be granted. It makes more sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

*Wilks*, 490 U.S. at 765. If the litigating party fails to join the outside party -- and thus allows the outsider to stay aloof from the litigation -- the litigating party should not be surprised when the outsider calls for its own day in court rather than accepting a judgment rendered in litigation in which it did not participate.

Indeed, a judgment generally has no effect on a nonparty even as to issues actually decided in the case that led to the judgment:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. * * * Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *see Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

B. The Court has articulated certain limited exceptions to this rule, cases in which persons are bound by judgments even though they are not parties to the cases in which those judgments are rendered. In *none* of those cases, however, has the Court countenanced preclusion of an absent non-consenting party without a concurrence of interest between the absent party and a party to the litigation -- for only in that instance could it be said that the non-consenting party's interests were fairly represented.[4]

The Court's attention to the relationship between the parties to a case and nonparties to be bound by a judgment is most evident in the class-action context. There, the Court expressly has accepted the "familiar doctrine of the federal courts that members of a class not present to the litigation may be bound by the judgment." *Hansberry*, 311 U.S. at 42-43. The Court firmly limited that rule, however, to cases in which the absent parties

> are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason [the present parties legally are entitled to represent the absent parties].

*Hansberry*, 311 U.S. at 43. That formulation allows courts considerable flexibility to structure class actions, but it plainly excludes binding absent class members to judgments in cases where their interests were represented

---

4 For a general summary of the exceptions articulated by the Court to date, *see* 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4454.

only by parties with conflicting interests. *See*, *e.g.*, FED. R. CIV. P. 23(a) (prohibiting class action unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class, and * * * the representative parties will fairly and adequately protect the interests of the class"); 1 RESTATEMENT OF JUDGMENTS (2D), *supra*, § 42(1)(d), at 406 (stating that a class member is not precluded by a judgment against a class representative where "there was such a substantial divergence of interest between [the representative] and the members of the class * * * that he could not fairly represent them").

C. Applying these principles to this context illustrates the error of the decision below. As the petition explains, a serious conflict of interest indisputably existed between Green (the indemnitor) and the State (the indemnitee). The plaintiff Greer could have prevailed against the State on either of two theories: One would have required indemnification by Green; the other would have barred indemnification. *See* Pet. 5-7, 18-19. Accordingly, the State could not fairly represent the interests of Green. Because the State could not fairly represent Green's interests, and because Green was not a party to the lawsuit, to deem Green precluded on the issues as to which the State had conflicting interests would violate due process.

Contrary to the impression created by the opinion of the court below, the analysis outlined above represents the mainstream, dominant course of authority on the question. For example, the *Restatement of Judgments (2d)* includes a separate section (§57) devoted to a codification of vouching principles. Subsection (2) dictates unambiguously that indemnitors such as Green should *not* be precluded by the judgment in the litigation between the plaintiff and the State:

> (2) If there is a conflict of interest between the indemnitor and the indemnitee, so that the indemnitor could not properly have assumed the defense of the indemnitee, a judgment for the injured person precludes the indemnitor only with respect to issues determined in that action as to which:
>
> (a) there was no conflict of interest between the indemnitee and the indemnitor; and
>
> (b) the indemnitee conducted a defense with due diligence and reasonable prudence.

2 RESTATEMENT OF JUDGMENTS (2D), *supra*, § 57(2), at 77.

Comment c and Illustration 4 to § 57 make clear that the provision was designed for just such a case as this. The comment explains that a conflict commonly "occurs when the injured party's claim may be upheld on different grounds, one of which is within the indemnity obligation and the other of which is not." *Id.* at 81. The commentary goes on to provide an illustration involving a defective ladder. The purchaser sues the seller claiming (a) that the ladder was defective; and (b) that the seller promised him that the ladder's strength was adequate. The manufacturer would be liable for damages based on claim (a), but not for damages based on claim (b). Accordingly, the Illustration explains, the manufacturer would not be bound by the determination of the seller's liability to the purchaser. *Id.* at 82 (Illustration 4).

The same analysis appears in the two modern court of appeals decisions addressing this question, both of which expressly approve the *Restatement*'s formulation. *See Universal American Barge Corp.* v. *J-Chem, Inc.*, 946 F.2d 1131, 1139-41 (CA5 1991) (*per* Reavley, J.)

(recognizing general validity of vouching, but adopting the *Restatement*'s view that "estoppel [by vouching] precludes only those issues in the indemnity action as to which * * * there was no conflict of interest between the indemnitee and the indemnitor"); *SCAC Transport (USA) Inc.* v. *Danaos*, 845 F.2d 1157, 1162 (CA2 1988) ("Where vouching is used but the indemnitor declines to assume the defense of an action, the indemnitor is bound by the result only when its interests have been adequately represented in the original action by the indemnitee.") (citing 2 RESTATEMENT OF JUDGMENTS (2D), *supra*, §57).[5]

Several older decisions of the courts of appeals have reached a similar conclusion. *See Humble Oil & Refining Co.* v. *Philadelphia Ship Maintenance Co.*, 444 F.2d 727, 735 (CA3 1971) (judgment against indemnitee not preclusive as to indemnitor if case presents charges on which indemnitor would be liable and charges on which indemnitor would not be liable); *Farm Bureau Mut. Automobile Ins. Co.* v. *Hammer*, 177 F.2d 793, 799 (CA4 1949) (vouched insurer precluded only on issues where its interests were "identical" to those of the insured), *cert. denied*, 339 U.S. 914 (1950); *Stout v. Grain Dealers Mut. Ins.Co.*, 307 F.2d 521, 524-25 (CA4 1962) (insurer has no duty to defend if it is "not possible for the insurer to defend the insured and at the same time protect its own interests"); *Barber-Greene Co.* v. *Bruning Co.*, 357 F.2d 31, 35 (CA8 1966) (*per* Blackmun, J.) (indemnitee not

---

5 *See also* 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4452, at 442-43 (favorably describing trend limiting preclusion by vouching in the presence of conflicts of interest). The other leading treatise offers no opinion on the question, but simply summarizes the provisions of the *Restatement (2d)* and the decision of the Fifth Circuit in *Universal American Barge*. 1B JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.405[9], at III-66 to III-68 (2d ed. 1995).

precluded when it failed to take over defense of case in which it "could not consistently defend both [the indemnitor]'s interests and its own"); *see also Ferguson* v. *Birmingham Fire Ins. Co.*, 460 P.2d 342, 348 (Or. 1969) (*en banc*) (following CA4's decision in *Hammer* and limiting preclusion to issues "where the interests of the insurer and insured in defending the original action are identical -- not where there is a conflict of interests"). *But see Howell* v. *Richardson*, 544 N.E.2d 878, 881 (Ohio 1989) ("[W]hether seized or not, the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding.").

Finally, a similar approach is reflected in several older state-court decisions, which followed the formulation of the *Restatement of Judgments (1st)*. Under that approach, "[t]he judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify. Thus, in a subsequent action the indemnitor may show that the circumstances under which he is required to give indemnity do not exist." AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS §107 comment g, at 517 (1942). That view produces results much like the current majority rule because it leaves the vouchee free to raise policy exclusions and defenses in later litigation between the voucher and vouchee.[6]

---

6 *See Karas* v. *Snell*, 142 N.E.2d 46, 55 (Ill. 1957) (holding that decision in litigation between plaintiff and insured is limited to issues "necessarily included in the adjudication" when "the interests of the voucher and the vo[u]chee are distinct and hostile"); *Miller* v. *United States Fidelity & Casualty Co.*, 197 N.E. 75, 77 (Mass. 1935) (holding that an insurer "is bound by the results of th[e] action [between the plaintiff and the insured] as to all matters therein decided which are material to recovery by the insured [but explaining that] "this does not mean that the insurer is barred from setting up in the action against it any matter constituting a defense and not already determined in the

* * *

In sum, the decision of the Supreme Court of Appeals of West Virginia erroneously resolved an important and frequently litigated question that affects a spectrum of commercial arrangements. The lower court's answer to that question is inconsistent with the majority of the decisions of other courts and inconsistent with the fundamental principles of due process articulated by this Court.

---

original action"); *Vaksman* v. *Zurich General Accident & Liability Ins. Co.*, 94 A.2d 186, 189 (Pa. Super. Ct. 1953).

## CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
*(Counsel of Record)*
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996

(4)

Supreme Court, U.S.
FILED
JUN 20 1996
CLERK

No. 95-1720

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

*Petitioners,*

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## REPLY BRIEF FOR PETITIONERS

ROBERT S. BRAMS
*Counsel of Record*

ALLAN A. TUTTLE
G. KENDRICK MACDOWELL
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5650

*Attorneys for Petitioners*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

9 pp

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| I. A "Right to Intervene" Is a "Right," Not a Compulsion ..... | 2 |
| II. The Due Process Violation Below Reflects an Abuse of Vouching -- *Not* Any Peculiarity in Court of Claims Practice ..... | 4 |
| CONCLUSION ..... | 6 |

## TABLE OF AUTHORITIES

**Cases** Page

*Richards v. Jefferson Cty., Ala.*, ___ U.S. ___, 64 U.S.L.W. 4405 (June 10, 1996) ..... 1, 3, 6

*Martin v. Wilks*, 490 U.S. 775 (1989) ..... 2, 5, 6

*Hansberry v. Lee*, 311 U.S. 32 (1940) ..... 3

*Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464 (1918) ..... 3

**Statutes and Rules**

W. Va. R. Civ. P. 24 (a) ..... 3

W. Va. R.C.C. 18 ..... 4

**On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## REPLY BRIEF FOR PETITIONERS

Petitioners Green Construction Company and American Insurance Company (collectively, "Petitioners")[1] herein reply to the arguments of Respondent Fred VanKirk, West Virginia Commissioner of Highways ("State") in its Brief in Opposition to the Petition for Writ of Certiorari.

The State's response enhances the case for review by this Court. The central fact that drives this due process petition is undisputed: Petitioners and the State were in direct, intractable conflict, and Petitioners confronted the choice of a binding, prejudicial judgment in their absence, or compulsory intervention. Nothing peculiar to the West Virginia Court of Claims diminishes the constitutional infirmity, or its potential mischief in any state or federal court with an intervention procedure. *See especially* ***Richards v. Jefferson Cty., Ala.***, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996) (unanimous decision) (reversing judgment of Alabama Supreme Court that had bound parties to prior litigation to which they were neither parties nor privies).

Nowhere does the State dispute:

- the direct conflict of interests between Petitioners and the State that prevented Petitioners from assuming the defense of the State;
- the split among the lower courts over the preclusive effect of vouching;

---

[1] Pursuant to Supreme Court Rule 29.6, Petitioners reference the currently accurate corporate information contained in the original Petition for Certiorari at pp. ii - iii.

- the prevalence of vouching; or
- the importance of due process parameters on the vouching procedure.

Instead, the State defends the judgment against Petitioners essentially on two grounds: (1) Petitioners could have intervened (as the West Virginia Supreme Court of Appeals held); and (2) impleader and joinder were not available in the West Virginia Court of Claims. As discussed below, the second argument is both wrong and irrelevant. The first argument begs the basic constitutional question about the proper consequences of declining to intervene.

## I. A "Right to Intervene" Is a "Right," Not a Compulsion.

The essential due process question in this petition pertains with equal force to all courts with an intervention procedure: if a party could have intervened, can it be bound by the judgment when its interests were unrepresented and directly adverse to the party asserting res judicata? "Petitioners pose a false dilemma," argues the State, because the "obligations" are really "disjunctive" rather than "conjunctive": Petitioners must either accept the defense *or* intervene. Opp. Cert. at 4. As Petitioners were in undisputed, direct conflict with the State, and thus could not possibly assume the State's defense without sacrificing their own, Petitioners' sole "obligation" was to intervene. All parties thus agree that the issue before this Court is not some curative *right* of intervention, but *compulsory* intervention.

This Court's jurisprudence on compulsory intervention, *e.g., Martin v. Wilks*, 490 U.S. 755 (1989), therefore underscores the importance of reviewing the erroneous judgment below. The State purports to distinguish *Martin v. Wilks* because it concerned a consent decree, but fails to suggest any principled basis for distinguishing its essential holding. Indeed, the different procedural context in *Martin*

actually enhances the importance of its holding to this case. The certworthy reality is this: in a great variety of procedural contexts, "judicial economy" will tempt lower courts to apply some species of "compulsory intervention." This case affords an opportunity to clarify that *Martin*'s essential holding is not limited to consent decrees.

The error in this case is even more fundamental than the error that inspired correction in both *Martin v. Wilks* and the Court's decision last week in *Richards*, — U.S. —, 64 U.S.L.W. 4405. Unlike the erroneously barred litigants in those cases, no one has ever contended—or could contend—that Petitioners interests were "adequately represented" in the adjudication that now binds them. To the contrary, the interests of Petitioners and the State were directly adverse. Where such undisputed conflict infects the prior proceeding, not even the class action mechanism precludes subsequent litigation. *Hansberry v. Lee*, 311 U.S. 32 (1940) (*cited in Richards*, — U.S. —, 64 U.S.L.W. 4405) ("because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the doctrone of representation of absent parties in a class suit could not support the decree").

Indeed, Petitioners' touted "right to intervene" is actually *irreconcilable* with the application of res judicata: if Petitioners "could have intervened," by definition their interests were not adequately represented. W. Va. R. Civ. P. 24(a) (intervention not available if "the applicant's interest is adequately represented"); *cf.* Fed. R. Civ. P. 24(a) (same). If, as all parties concede, Petitioners' interests were not adequately represented, then Petitioners were plainly neither parties nor privies—by *any* definition—in the adjudication that now binds them. As res judicata first requires identity of parties or privies, res judicata should not have barred

Petitioners' day in court on issues that were never fairly adjudicated. *See Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918) (". . . a State . . . cannot, without disregarding the requirements of due process, give a conclusive effect to a prior judgment against one who is neither a party nor a privy with a party therein.") (*quoted in Richards*, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996)).

**II. The Due Process Violation Below Reflects an Abuse of Vouching—*Not* Any Peculiarity in Court of Claims Practice.**

The State rests most of its argument and case analysis on the false assertion that the West Virginia Court of Claims lacks any procedure for joinder or impleader, which, even were it true, would not diminish the importance of this Court's review. The State cites no authority (there being none) for its apparently key argument. The State merely observes that there appears to be no rule expressly providing for joinder and impleader—just as there is no rule expressly providing for intervention.

In fact, the West Virginia Court of Claims operates exactly as any other state or federal court for purposes of the issues in this case. As the State itself emphasized in briefing below, the West Virginia Court of Claims Rules of Civil Procedure state that "[t]he Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary." W. Va. R.C.C. 18. The State did not, and cannot, cite any Court of Claims rule that would preclude third-party practice in the Court of Claims.

Indeed, if Court of Claims jurisdiction were so limited that it could not even entertain impleader or joinder—as the State mistakenly suggests—then the Court of Claims would not have had jurisdiction to determine Petitioner's liability *at all.* If the State cannot implead a party that might be

ultimately liable on the claim, then neither can the State determine that party's liability in its absence. In fact, if the State's conclusory suggestion were true, one wonders how the vouching procedure itself could have been available. Moreover, the State does not and cannot explain why intervention would be available, but not impleader. No principled basis for such inherently contradictory limitations exists.

More fundamentally, *it does not matter whether impleader was available below*. The due process violation occurred because the *vouching* procedure was abused. If the West Virginia holding with respect to vouching is allowed to stand, then the due process violation can and likely will be repeated in jurisdictions that permit vouching—regardless of impleader and joinder rules.

Wherever vouching is permitted (49 states and the District of Columbia, including state and federal court and arbitral proceedings), its evident advantages would typically commend it over impleader or joinder. Indeed, what possible incentive would move the State to *implead* Green and American if the State could bind them merely by *inviting* them. More critically, why would any party *ever* implead an *adverse* party if the party could be bound "by invitation only"? While the legal issue in this Petition may be narrowly framed, its implications extend well beyond the borders of West Virginia.

The final refuge for a party seeking to bind a party that was neither party nor privy in the prior proceeding is likewise explained in *Martin v. Wilks*: "where a special remedial scheme exists expressly forclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process." 490 U.S. at 762. The State does not even hint that this case might

concern any such "special remedial scheme." For orderly adjudication of rights to assets of estates, bankruptcy and probate proceedings require some mechanism for preclusion of absent parties. No such special justification exists in this ordinary contract dispute.

Petitioners do not press the outer reaches of due process. It is first and fundamentally the law that a party cannot be bound by a judgment in its absence.[2] It is the State that presses an unprincipled exception: a party *can* be bound by a judgment in its absence—even when it was unrepresented in the proceeding, *and* its interests directly conflicted with the party asserting res judicata. The judgment of the Supreme Court of Appeals of West Virginia perpetuates this unprincipled exception to the core protection of due process.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
Robert S. Brams
*Counsel of Record*
Allan A. Tuttle
G. Kendrick Macdowell
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington D.C. 20037
(202) 457-5650

June 19, 1996

---

[2] "[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party[.]" *Martin*, 490 U.S. at 761; *accord Richards*, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996).